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In the Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. TARANTO
Assistant to the Solicitor General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

40 pp

QUESTION PRESENTED

Whether Congress may constitutionally prohibit indecent as well as obscene interstate commercial telephone messages, as it did in Section 223(b) of the Communications Act of 1934, as amended in 1988 (to be codified at 47 U.S.C. 223(b)).

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra,* 1a-6a) is not yet reported.

JURISDICTION

The preliminary injunction (App., *infra,* 7a-8a) was issued by the district court on July 19, 1988. A notice of appeal to this Court (App., *infra,* 9a-10a) was filed on July 29, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.[1]

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[1] Pursuant to the Act of June 27, 1988, Pub. L. No. 100-352, § 1, 102 Stat. 662, which was signed by the President on June 27, 1988, Section 1252 was repealed effective September 25, 1988 (§ 7, 102 Stat. 664).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech * * *."

Section 223(b) of the Communications Act of 1934, as amended effective July 1, 1988, by the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424 (to be codified at 47 U.S.C. 223(b)), provides:

> (b)(1) Whoever knowingly—
>
> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A),
>
> shall be fined not more than $50,000 or imprisoned not more than six months, or both.
>
> (2) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

The repeal does not affect this case, as it does "not apply to cases pending in the Supreme Court on the effective date * * * or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date" (*ibid.*).

(3)(A) In addition to the penalties under paragraphs (1) and (2), whoever, in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either –

(i) by a court, pursuant to a civil action by the [Federal Communications] Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

STATEMENT

In 1988, Congress amended Section 223(b) of the Communications Act of 1934, 47 U.S.C. (& Supp. III) 223(b), to prohibit indecent as well as obscene interstate commercial telephone messages. Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424. Appellee, a company that provides so-called "dial-a-porn" telephone services, brought this action challenging amended Section 223(b) as unconstitutonal, chiefly under the First Amendment. The district court denied

appellee's request for a preliminary injunction against enforcement of the statute's ban on obscene telephone messages. The court issued the requested preliminary injunction, however, against enforcement of the statute's ban on indecent telephone messages.

1. The statute at issue in this case is the most recent result of Congress's efforts to protect children against so-called "dial-a-porn"—that is, sexually explicit or suggestive messages, typically prerecorded, that are provided for a fee over the telephone. See 134 Cong. Rec. S4377 (daily ed. Apr. 20, 1988). A provider of dial-a-porn messages arranges with a telephone company to use special telephone lines, typically though not always with the prefix "976," that are designed to handle large numbers of calls simultaneously. See *Carlin Communications, Inc.* v. *FCC*, 787 F.2d 846, 850-851 (2d Cir. 1986) (*Carlin II*). The telephone company typically charges callers according to prescribed tariffs, retains a portion of the charges, and remits the remainder to the dial-a-porn company. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd 2714, 2715 (1987) (*Third Report*).[2]

Recorded dial-a-porn messages, which the purveyors can and often do change at least once a day, contain a wide range of explicit descriptions of sexual acts. The record in this case, for example, shows that callers to the

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[2] Other dial-a-porn companies, unlike the appellee in this case, provide live, "two-way" sex conversations with persons calling a specified number and providing a credit card number for payment. See 2 F.C.C. Rcd at 2715. This form of dial-a-porn service is at issue in *Roe* v. *Meese*, 689 F.Supp. 344 (S.D.N.Y. 1988) (granting preliminary injunction against Section 223(b)'s prohibition of indecent speech, but refusing preliminary injunction against section's prohibition of obscene speech).

service provided by appellee's affiliate could hear recorded messages describing a woman having sex with a dog, a female "sex therapist" teaching her "special methods" to a young girl, and "master-slave" sex with whips and chains. See Gov't Opp. to Pltf. Mot. for Prelim. Inj. Exh. A. Providers of dial-a-porn aggressively market their services, and they have been extremely successful. See *Carlin Communications, Inc.* v. *FCC*, 749 F.2d 113, 114 (2d Cir. 1984) (*Carlin I*) ("800,000 calls per day were made to dial-a-porn in May, 1983; 180,000,000 calls in the year ending February, 1984"). Because of the aggressive marketing, which includes leaving fliers on cars and distributing them throughout neighborhoods, young children are easily able to obtain the telephone numbers, and they make a substantial portion of all dial-a-porn calls. See 134 Cong. Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats).

2. a. Congress made its first attempt to prevent children from gaining access to dial-a-porn in 1983, just after the dial-a-porn industry was launched. In a measure sponsored by Representative Bliley (see *Carlin I*, 749 F.2d at 115-116), Congress added a new subsection (b) to Section 223 of the Communications Act of 1934, 47 U.S.C. (Supp. III) 223(b). Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8(b), 97 Stat. 1470. The provision made it a crime to use telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent" (47 U.S.C. (Supp. III) 223(b)(1)). The enactment provided, however, that it would be a defense to prosecution that the defendant restricted access to adults "in accordance with procedures which the [Federal Communications] Commission shall

prescribe by regulation" (47 U.S.C. (Supp. III) 223(b)(2)). The statute provided for criminal and civil penalties, including daily fines and up to six months' imprisonment for each violation (47 U.S.C. (Supp. III) 223(b)(1), (3), and (4)). It authorized the Federal Communications Commission (FCC or Commission) to initiate judicial or administrative proceedings to assess civil fines and the Attorney General to bring suit to enjoin violations (47 U.S.C. (Supp. III) 223(b)(4) and (5)).

b. Throughout the next four years, the FCC sought to promulgate regulations to define the safe-harbor defense to prosecution as authorized by the statute. The first set of regulations would have established a defense for those dial-a-porn purveyors that operated only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time or that required payment by credit card before transmission of the message. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 49 Fed. Reg. 24996 (1984) (*First Report*). Explaining how the regulations sought to protect children from dial-a-porn, the Commission stated its belief that, during the specified night-time hours, "a majority of parents would be available to supervise the actions of their children" (*id.* at 25001) and that "credit cards are not routinely issued to minors without parental authorization" (*id.* at 25000).

In *Carlin I, supra*, the Second Circuit set aside the regulations and remanded them to the Commission. Although the court recognized that the government's "interest in protecting minors from salacious matter is no doubt quite compelling" (749 F.2d at 121), it concluded that the operating-hours requirement was "both overinclusive and underinclusive" (*ibid.*). It explained that the regulation "denie[d] access to adults between certain hours, but not to youths who can easily pick up a private

or public telephone and call dial-a-porn during the remaining hours" (*ibid.*). It also found no adequate explanation "why a prohibition on dial-it services is needed during daytime school hours when children are for the greater part of the year likely to be in class under adult supervision, while the prohibition is not needed after 9:00 p.m. Eastern Time (6:00 p.m. on the West Coast), when a young person needs to be unsupervised for only about ninety seconds in order to dial the number and hear the message" (*ibid.*). The court further found that the record did not adequately explain the Commission's rejection of alternative methods of restricting access, such as "screening or blocking or using access numbers" (*id.* at 122).

c. On remand, the Commission promulgated new regulations. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order*, 50 Fed. Reg. 42699, 42701 (1985) (Second Report). The new regulations continued to permit prior credit card payment as a defense to prosecution. They abandoned time restrictions, however, and added instead a defense based on use of access codes, which the Commission found to be feasible and the least burdensome means of implementing the regulatory mandate (*id.* at 42705).

In accordance with the remand order, the Commission examined the options of blocking or screening telephone numbers at the customer's premises or at the telephone company offices; but it rejected those alternatives. 50 Fed. Reg. 42702-42706 (1985). So-called "exchange blocking," which blocks numbers with a specified exchange (*e.g.*, "976"), the Commission concluded, would impose substantial costs on telephone companies, requiring new equipment, software, and other measures (*id.* at 42702). Such blocking would also block *all* "dial-it" services using the exchange, including weather and sports information (*ibid.*); at the same time, dial-a-porn services could avoid

the restriction by offering their services on unblocked exchanges (*e.g.*, other than "976") (*id.* at 42702-42703). As for full "line number" (seven-digit) blocking, the technology for doing so was experimental, not yet universally available, and expensive; and it could not "handle the large number of 'dial-a-porn' systems currently in operation" (*id.* at 42703). Also, of course, "minors need only seek unsupervised telephones in residences where customers do not subscribe to the screening services to gain access to the messages" (*ibid.*).[3]

The Commission was not blind to the imperfections in its credit-card and access-code regulations. It recognized that "[n]o method guarantees that some enterprising minors will never hear the messages" (50 Fed. Reg. 42706 n.54 (1985)) and, thus, that dial-a-porn access codes and credit cards might be obtained and used by some children. It nonetheless concluded that its new regulations provided the "most effective method currently available to restrict access by minors without unduly impairing adults who want to hear the messages" (*ibid.*).

In *Carlin II, supra,* the Second Circuit upheld the Commission's rejection of blocking at the telephone company offices (787 F.2d at 853), but it remanded the new regulations on other grounds. Limiting its analysis to New York Telephone Company lines, the court concluded that the record did not support the FCC's ruling that access codes were the least restrictive means to regulate dial-a-porn (*id.* at 848, 855). The court explained that the access-code requirement in fact presented substantial problems of feasi-

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[3] The Commission rejected other options on similar grounds—*e.g.*, that they were not technologically and economically feasible, or that they were overbroad and unreasonably intrusive on adults' access (as with scrambling devices). *E.g.*, 50 Fed. Reg. 42704 (1985).

bility for the New York network (*id.* at 855), and it reasoned that the Commission had not adequately considered the feasibility of using blocking equipment at the customer's premises with the costs to be borne by the dial-a-porn providers or by the telephone companies (*id.* at 855-856).

d. In response, the FCC promulgated a third version of the regulations. *Third Report, supra.* The FCC found that, since the date *Carlin II* was decided, New York Telephone had developed a means of permitting its customers to use access codes; it therefore reinstituted the access code defense in the New York area (2 F.C.C. Rcd at 2720). The new regulations also added message scrambling to the defenses of prior credit-card payment and access-code use.

The Commission again rejected customer-premises blocking devices as too expensive and ineffective in preventing access of children to dial-a-porn, given the ease of disabling them and the ready access to dial-a-porn through the great majority of telephones that would not have a blocking device attached (2 F.C.C. Rcd at 2719-2720). By contrast, the Commission found that scrambling would not be burdensome for the message provider and would make dial-a-porn accessible only through telephones with descramblers, which themselves were not expensive; hence, having reconsidered the matter, it concluded that scrambling would be effective in reducing access to dial-a-porn by minors and could be implemented at reasonable cost (*id.* at 2720-2721). The Commission noted, however, that "absolute impossibility of access to [dial-a-porn] services by minors is not feasible" (*id.* at 2724 n.14). Moreover, the Commission acknowledged that scrambling "will not achieve the highest effectiveness unless sale of descramblers to minors is prohibited," and it therefore urged "states to exercise their authority to prohibit sale of descramblers to minors" and "[r]etailers * * * to play a re-

sponsible role concerning [such] sale[s]" (*id.* at 2722).[4]

In *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546 (2d Cir. 1988) (*Carlin III*), petition for cert. pending, No. 88-37, the court of appeals upheld the new regulations as a "feasible and effective way to serve" the "compelling government interest" in "protect[ing] minors from obscene speech" (*id.* at 555), although the court directed the FCC to reopen its proceedings if a less restrictive technology becomes available (*id.* at 556). The court ruled, however, that the statute would be unconstitutional insofar as it could be construed to restrict speech that is merely indecent rather than obscene, while suggesting that the statute need not be so construed (*id.* at 558-561). The court explained that the statute's "use of 'indecent' was clearly made with *FCC v. Pacifica Foundation*, 438 U.S. 726 * * * (1978), in mind" (837 F.2d at 558 (citing 129 Cong. Rec. H10559, 10560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley)), but it concluded that "the *Pacifica* decision does not justify the regulation of indecent telephone messages" as opposed to broadcasting messages (837 F.2d at 560).

3. While the FCC's third regulations were under review in the Second Circuit, Congress revisited the dial-a-porn issue in light of the FCC's experience in attempting to implement Section 223(b). Congress heard testimony on both the factual and legal issues (see *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987) (*1987 Hearing*)) and concluded that there was no sufficient-

[4] The Commission also required that, if the defendant provides messages using AT&T 900 service, to obtain a defense to prosecution it must ask AT&T that its service be subject to "billing notification" – *i.e.*, an itemization on telephone bills that a particular call was to an adult message service (2 F.C.C. Rcd at 2722).

ly effective measure to eliminate the access of children to dial-a-porn short of an outright ban. In the words of Representative Bliley, who had sponsored the original enactment of Section 223(b), it had become "clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material. We looked for effective alternatives to a ban—there were none." 134 Cong. Rec. H1691 (daily ed. Apr. 19, 1988). See also *id.* at H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats) ("it is not technologically possible to keep this information out of the hands of young people"); *id.* at H1690 (statement of Rep. Hall) ("the current regulations adopted by the FCC are not effective in stopping the spread of dial-a-porn to minors"); *id.* at S4377 (daily ed. Apr. 20, 1988) (statement of Sen. Hatch) ("if a so-called technological solution to the access of our children to dial-a-porn had been available, I, of course, would have supported it").

Accordingly, after discussing the practical and constitutional questions relevant to a prohibition of indecent and obscene commercial interstate telephone messages (see, *e.g.*, 133 Cong. Rec. S16794-S16800 (daily ed. Dec. 1, 1987); 134 Cong. Rec. H1690-H1703, H1806-H1836 (daily ed. Apr. 19, 1988)), Congress voted to broaden Section 223(b)'s express reach beyond telephone calls to minors and to eliminate the provision that permitted a defense to prosecution based on FCC regulations. Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424.[5] As amended, Section

[5] The Senate passed the dial-a-porn prohibition by a vote of 98-0 (133 Cong. Rec. S16800 (daily ed. Dec. 1, 1987) as an amendment to the larger education bill, H.R. 5, 100th Cong., 1st Sess. § 7003 (1987) (see 133 Cong. Rec. S17048 (daily ed. Dec. 2, 1987)). The Senate subsequently agreed to the conference report on H.R. 5 as amended to

223(b) prohibits the making of "any obscene or indecent communication * * * by means of telephone * * * for commercial purposes * * * in the District of Columbia or in interstate or foreign communication." The subsections providing for criminal and civil penalties and for injunctive relief have not been changed.

4. Appellee is a major purveyor of dial-a-porn messages in California and is affiliated with Carlin Communications, Inc. Before the Section 223(b) amendments took effect on July 1, 1988, appellee brought this suit in the United States District Court for the Central District of California. Appellee sought declaratory and injunctive relief chiefly on the ground that Section 223(b)'s restrictions on obscene and indecent speech violate the First Amendment. On appellee's motion for a preliminary injunction, the district court partly agreed and partly disagreed with the contention that Section 223(b) is unconstitutional. App., *infra,* 1a-6a.[6]

In declining to issue a preliminary injunction against Section 223(b)'s prohibition of obscene telephone messages (App., *infra,* 4a-5a), the court observed that "obscene speech is unprotected by the First Amendment" (*id.* at 4a). It rejected appellee's argument that Section

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contain the identical dial-a-porn prohibition (134 Cong. Rec. S4386 (daily ed. Apr. 20, 1988)). The House approved H.R. 4401, 100th Cong., 2d Sess. (1988), which was identical to the Senate amendment to H.R. 5, by a vote of 380-22 (134 Cong. Rec. H1702-H1703 (daily ed. Apr. 19, 1988)). It then agreed to the conference report on H.R. 5 as amended to contain the provision (*id.* at H1836).

[6] Appellee also challenged Section 223(b) as vague in violation of the Fourteenth Amendment. (Presumably, appellee meant to invoke the Fifth Amendment.) The district court did not separately address any vagueness contention. It simply read the statute as incorporating the definition of "obscene" set forth in *Miller* v. *California,* 413 U.S. 15 (1973), and as using "indecent" as in *FCC* v. *Pacifica Found.,* 438 U.S. 726 (1978).

223(b) is inconsistent with this Court's ruling in *Miller* v. *California*, 413 U.S. 15 (1973), because it creates a national, rather than local, standard of obscenity. The court found applicable to the current version of Section 223(b) the Second Circuit's ruling that the 1983 version does " 'not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, or the broadcasting of obscene messages' " (App., *infra*, 4a (quoting *Carlin III*, 837 F.2d at 561)).[7]

On the other hand, the court issued a preliminary injunction against enforcement of Section 223(b) insofar as it applies to indecent speech (App., *infra*, 7a-8a), holding that Section 223(b)'s "flat-out ban of indecent speech is contrary to the First Amendment" (App., *infra*, 4a). In a very brief discussion, the court concluded that, "insofar as it applies to 'indecent' communications," Section 223(b) is "overbroad and unconstitutional" (App., *infra*, 3a). The court reasoned: although "the government unquestionably has a legitimate interest in, *e.g.*, protecting children from exposure to indecent dial-a-porn messages, § 223(b) is not narrowly drawn to achieve any such purpose" (*id.* at 4a). In thus holding Section 223(b) partly unconstitutional, the court explained (App., *infra*, 3a) that "[w]hat is at issue is the breadth to be given to *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978)," and it concluded that *Pacifica* should be narrowly read so as not to reach outside the broadcasting context to Section 223(b) (App., *infra*, 3a).

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[7] Appellee filed an application to this Court for an injunction pending appeal against enforcement of Section 223(b)'s ban on obscene telephone messages. *Sable Communications of Calif., Inc.* v. *FCC*, No. A-143. The application was denied by Justice O'Connor on August 30, 1988.

THE QUESTION IS SUBSTANTIAL

In *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), this Court upheld the Commission's prohibition on the broadcast of indecent material on daytime radio, relying principally on the measure's aim of protecting children against such material. The Court emphasized the narrowness of the question it was deciding (*id.* at 750-751) and noted, in particular, that "each medium of expression presents special First Amendment problems" (*id.* at 748). This case involves telephones rather than broadcasting and a complete ban on indecent speech in the particular medium (when commercial and interstate) rather than only a daytime ban. In these respects, the case presents a question of first impression, not squarely controlled by the precise holding of *Pacifica*. The question, which involves the constitutionality of a carefully considered federal statute enacted by almost unanimous votes of Congress, is substantial and should be set for plenary consideration by this Court.[8]

Although *Pacifica*'s holding does not itself decide this case, the Court's reasoning in *Pacifica* strongly suggests that Section 223(b)'s ban on indecent speech, like the Commission action upheld in *Pacifica*, is consistent with the First Amendment. This Court, we submit, accordingly should reverse the district court's decision striking down that portion of the statute.[9] This case, like *Pacifica*, in-

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[8] The district court having held a federal statute unconstitutional in part, this Court has jurisdiction under 28 U.S.C. 1252 to review the district court's preliminary injunction. See, *e.g.*, *McLucas* v. *DeChamplain*, 421 U.S. 21, 30 (1975); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947).

[9] When Congress was considering the bills that led to the enactment of the 1988 amendment to Section 223(b), the FCC General Counsel pointed out to Congress that the FCC had "consistently regarded a total ban on the dissemination of indecent, but not obscene, material

volves "indecent speech"—speech that, unlike speech on issues of public concern, is not at the "heart" or the "core" of the First Amendment (*Frisby* v. *Schultz*, No. 87-168 (June 27, 1988), slip op. 4; *Hustler Magazine* v. *Falwell*, No. 86-1278 (Feb. 24, 1988), slip op. 4). Cf. *Pacifica*, 438 U.S. at 743 (opinion of Stevens, J.) (indecent speech must "surely lie at the periphery of First Amendment concern").[10] And, like *Pacifica*, this case involves a federal

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to be beyond the bounds permitted by *Pacifica*." *1987 Hearing* at 246 (letter of FCC General Counsel). See also *id.* at 250. The FCC General Counsel also testified that "there may be serious problems in sustaining the constitutionality" of the indecency portion of what became Section 223(b) (*1987 Hearing* at 213). In addition, the United States Attorney for the District of Utah informed Congress that he was "of the opinion that an outright ban of indecent dial-a-porn messages would likely be found unconstitutional by the courts" (*id.* at 258).

Those statements—as predictions of likely judicial rulings and an acknowledgement that *Pacifica* does not by its terms cover the telephone ban at issue here, but would require an extension to reach this case—are not necessarily inconsistent with the view that Section 223(b) should be sustained as enacted. In any event, it is our position in this Court that the Court should affirm the constitutionality of Section 223(b) based on the determinations that Congress made in enacting it.

[10] The 1988 version of Section 223(b), like its 1983 predecessor, does not define the terms "obscene" and "indecent." The legislative history of both enactments, however, makes clear that Congress understood the terms as they were used in the decisions of this Court in *Miller* v. *California*, *supra*, and *Pacifica*. See 129 Cong. Rec. H10560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley); *id.* at E5966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier); 133 Cong. Rec. S16796-S16799 (daily ed. Dec. 1, 1987) (memorandum of law); 134 Cong. Rec. S4378-S4381 (daily ed. Apr. 20, 1988) (same); *id.* at H1691-H1695 (daily ed. Apr. 19, 1988) (memorandum of law); *Carlin III*, 837 F.2d at 558.

Under *Miller*, obscene speech "must, taken as a whole, appeal to prurient interest, must contain patently offensive depictions or descriptions of specific sexual conduct, and on the whole have no

effort to prevent children from gaining access to such speech through an interstate communications technology that presents special dangers of such access. Congress has a compelling interest in taking effective measures to protect children from the harmful effects of the accessibility of indecent speech to children in the home through telephones. Congress determined that there is no technological solution that could ensure that children would not gain access to telephone pornography, including obscene and indecent speech. That determination, together with the fact that adults may obtain obscene and indecent recorded messages by other means that do not pose the same danger of children's access, is sufficient to sustain Section 223(b)'s ban on commercial indecent interstate telephone communications against appellee's facial challenge.[11]

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serious literary, artistic, political, or scientific value." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). In contrast, the *Pacifica* opinion, while containing no express definition of "indecent," makes clear that the "indecent speech" that the Court held was subject to FCC regulation was speech that was patently offensive according to accepted community standards but that, unlike obscene speech, did not necessarily have a "prurient appeal." See *Pacifica*, 438 U.S. at 739-741. The Commission ruling that was upheld by the Court in *Pacifica* found the language at issue indecent because it " 'describe[d], in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience' " (*id.* at 732 (citation omitted)).

[11] Although much (perhaps most) of the speech on dial-a-porn is presumably obscene under the *Miller* standard, it has not been disputed in this case that appellee also sells indecent speech, or would do so if permitted (especially if prohibited from selling obscene speech).

Appellee challenged Section 223(b)'s ban on indecent speech on its face, and the district court found the ban overbroad (App., *infra*, 3a). This Court has made clear that facial invalidation for overbreadth is "strong medicine" to be used "with hesitation, and then only as a last resort," and is proper only if the statute has a "substantial number of

1. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, this Court has long recognized that the government has a "compelling" interest in " 'safeguarding the physical and psychological well-being' " of children (*New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982) (citation omitted)). The Court has explained that the First Amendment permits government regulations designed to protect children from exposure to indecent speech, even if such speech is otherwise protected. See *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 690 (1968) ("because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults"). And the Court has held that bookstores and movie theatres may be prohibited from making indecent material available to children, *Ginsberg* v. *New York*, 390 U.S. 629 (1968); radio stations may be prohibited from broadcasting indecent material accessible to children, *Pacifica, supra;* and persons may be prosecuted for distributing pornographic materials using depictions of sexually explicit conduct by children even though such materials might not be legally obscene, *New York* v. *Ferber, supra.*

2. The Court's decision in *Pacifica*, which upheld the FCC's authority to prohibit the afternoon radio broadcast of a comedy monologue containing indecent speech, is of

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impermissible applications" (*New York* v. *Ferber*, 458 U.S. 747, 769, 771 (1982) (internal quotation marks omitted)). See also *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). It is therefore not enough for appellee to show that Section 223(b)'s ban on indecent speech may have some impermissible applications.

course centrally important to evaluating the constitutionality of the congressional ban on indecent telephone speech in this case. The Court there reasoned that "special treatment of indecent broadcasting" is "amply justif[ied]" by the "ease with which children may obtain access to broadcast material," coupled with "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household.' " 438 U.S. at 749-750 (quoting *Ginsberg* v. *New York*, 390 U.S. at 639, 640). As noted, *Pacifica* itself recognized that "each medium of expression presents special First Amendment problems" (438 U.S. at 748), and this Court observed in a case concerning the use of the mails to distribute contraceptive advertising (*Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983)) that the government's interests in regulating broadcasting do "not readily translate into a justification for regulation of other means of communication." Those cautions, however, mean only that careful analysis of context is necessary before the reasoning of *Pacifica* is extended outside the broadcasting context. Here, an extension is warranted: the factors relied on in *Pacifica* fully support the ban on commercial indecent telephone communications at issue in this case.

3. Like radio and television, the telephone is a technological means by which messages come into the home and is "uniquely accessible to children" (*Pacifica*, 438 U.S. at 749). Not only is the telephone as much a fixture in modern American homes as radio and television (see U.S. Bureau of the Census, *Statistical Abstract of the United States* 523 (108th ed. 1988) (92.5% of households have telephone service; 99% have radios and 87.4% have television)); but even for young children, dialing a telephone is as easy as turning on a radio or television set. Moreover, the aggressive marketing techniques of companies like appellee make dial-a-porn telephone numbers readily avail-

able to minors. See 134 Cong.Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats) (dial-a-porn companies "use indiscriminate marketing strategies, place fliers on windshields, indiscriminately flier neighborhoods, and spread the telephone numbers around to anyone without regard to age"). From the perspective of parents, what this Court said of indecent broadcasting in *Pacifica* applies as well to indecent telephone speech: it "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder" (*Pacifica*, 438 U.S. at 748 (citation omitted)). See also *Frisby* v. *Schultz*, slip op. 9-10.

The ability of parents to prevent their children from gaining access to indecent communications is severely restricted by the nature of telephone conversations. Monthly bills may provide some information about children's calls, but that information is limited and is received long after the calls have been made.[12] It is almost impossible (without routinely listening in on an extension) for parents to monitor their children's telephone conversations. The difficulty of parental supervision is magnified by the fact that "a young person needs to be unsupervised for only about ninety seconds" in order to hear a dial-a-porn message (*Carlin I*, 749 F.2d at 121). In addition, children can obtain access to such messages from telephones outside the home.

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[12] A parent's receipt of information in the telephone bill at the end of a month does not enable the parent to prevent or to cure the harm inflicted on children who have listened to sexually explicit messages during the month. Cf. *Pacifica*, 438 U.S. at 748-749 (footnote omitted) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.").

The similarity of dial-a-porn providers and broadcasters is underscored by the fact that telephone sex services are typically designed so that messages can be provided to many callers at the same time. The Second Circuit observed in *Carlin II* (787 F.2d at 850) that, in New York, for example, "over 7,900 callers can be connected simultaneously to the same recorded message and the system as a whole can handle over 400,000 calls per hour." Given that capability, the dial-a-porn provider in effect "broadcasts its messages," though it uses wires, and the telephone company correspondingly "resembles less a common carrier than it does a small radio station" (*Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987), cert. denied, No. 87-1479 (Apr. 25, 1988)).[13]

With respect to children, it makes no difference that a caller must voluntarily dial a telephone number in order to gain access to a dial-a-porn service, because children's voluntary dialing was the focus of congressional concern and is a legitimate object of a statutory prohibition. Children have a natural curiosity about sex and adult behavior but are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees" (*Ginsberg* v. *New York*, 390 U.S. at 649-650 (Stewart, J., concurring in the result)). In a very

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[13] Indeed, by using the nationwide telephone system, dial-a-porn providers free themselves of the physical constraints that limit the geographical reach of individual broadcast stations. Persons in any part of the country have the ability to call a dial-a-porn provider, while the audience of an individual radio or television station is geographically limited. One consequence of such nationwide access is that time restrictions are necessarily less effective in preventing children from obtaining access to dial-a-porn than they might be in preventing access to broadcasts, because persons in one time zone have the ability to call a provider in another.

real sense, indecent speech available on the telephone is an insidious form of "attractive nuisance" for children—a 24-hour-a-day, 7-day-a-week temptation that is available at the touch of a few buttons (or turns of a dial) at home, at a friend's house, or at any public phone booth.

In this case, Congress found that the ready availability of graphic sexual messages was having "devastating impacts on young children." 134 Cong. Rec. H1713 (daily ed. Apr. 19, 1988) (statement of Rep. Coats). See *id.* at S4377 (daily ed. Apr. 20, 1988) (statement of Sen. Hatch) (dial-a-porn is a "problem which considerable evidence has shown is detrimental to [the] physical, intellectual, and moral well-being" of children). As Representative Coats stated, "[r]ecords show that a substantial portion of the calls that are made are made by young children, children of very impressionable ages that hear graphically pornographic material that leaves a vivid impression on them. Experts have testified that such messages can cause drastic changes in behavior in some of those young people." *Id.* at H1699 (daily ed. Apr. 19, 1988).[14]

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[14] One clinical psychiatrist has noted that a child's exposure to dial-a-porn messages may lead to various psychological complications, such as premature sexual arousal, gross misunderstandings of human sexuality, and confusion about sexual values. Because children often view the telephone as an authoritative source of information, they may develop a fascination with what they hear and attempt to imitate adult behavior by acting out sexual messages with other children (Declaration of Dr. Victor B. Cline, ¶ 3.i, 3.j, attached as Exh. F. to Gov't Opp. to Pltf. Mot. for Prelim. Inj.). Congress was aware of two disturbing incidents involving children and telephone pornography in California alone. In one, a 12-year-old boy admitted having oral sex with a 4-year-old girl after hearing dial-a-porn messages on a church telephone. In the other, two boys (ages 15 and 11) sexually molested a 10-year-old girl after the three listened to dial-a-porn messages and repeated what they had heard to each other. See 133 Cong. Rec. S16794-S16795 (daily ed. Dec. 1, 1987) (statement of Sen. Helms);

In short, this case, like *Pacifica,* involves indecent speech that Congress legitimately determined to be harmful to minors. And this case, like *Pacifica,* involves a technological medium of communication that intrudes into the home and is readily accessible to minors. In these circumstances, it is just as legitimate for Congress to take special measures to prevent minors' access to such speech through the particular medium of interstate telephones as it was for the FCC, pursuant to 18 U.S.C. 1464, to take steps against indecent broadcasting for that purpose in *Pacifica.*

4. While *Pacifica* involved only a daytime broadcasting ban, Section 223(b) bans commercial interstate indecent telephone communications at all hours. Whatever the validity of such a more comprehensive restriction in the broadcasting context, a question that *Pacifica* did not reach, the ban is valid in the setting presented in this case. Congress legitimately concluded that no lesser measure would protect all children, rather than only some children, from the harmful effects of the availability by telephone of patently offensive sexual messages.

In 1983, Congress sought to preclude access by children to dial-a-porn by instructing the FCC to devise methods of removing children from the dial-a-porn audience while permitting adults to continue to obtain access to such messages. 47 U.S.C. (Supp. III) 223(b). In 1988, it revisited the issue in light of the FCC's four-year effort to promulgate effective and valid regulations. Congress came to the conclusion that access by children to phone pornography could not adequately be prevented without prohibiting telephone pornography altogether.

While lesser means might accomplish the task for the sale of adult books and movies, Congress concluded that

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see also 134 Cong. Rec. S4377-S4378 (daily ed. Apr. 20, 1988) (statement of Sen. Helms).

there is simply no "technological solution" that could sufficiently separate the audience of children from the audience of adults at the point of commercial sale—that there was no feasible way to prohibit indecent commercial telephone messages for one and not the other. 134 Cong. Rec. H1691 (daily ed. Apr. 19, 1988) (statement of Rep. Bliley) ("We looked for effective alternatives to a ban—there were none."). See sources cited at page 11, *supra*.[15] In other words, the dial-a-porn provider, like the broadcaster in *Pacifica*, "cannot reach willing adults without also reaching children" (438 U.S. at 758-759 (Powell, J., concurring in part and concurring in the judgment)). And, given the nature of the telephone system, the lesser measures proposed by the FCC in its rulemaking proceedings, effective as they might have been, could not achieve the valid end of totally precluding access by minors.

5. The district court acknowledged that the government's interest in protecting children from dial-a-porn is "unquestionably • • • legitimate," but it determined that Section 223(b)'s "flat-out ban of indecent speech" is not "narrowly drawn" to protect that interest (App., *infra*, 4a). That conclusion is incorrect. Section 223(b) does not ban all indecent speech for adults, and it is not overbroad given the access that young children have to telephones and the insufficiency of lesser measures.

First, Section 223(b) restricts the method by which indecent telephone communications may be distributed, but it does not prohibit the dissemination of such messages entirely. Intrastate messages and messages not made for commercial purposes, for example, do not come within the

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[15] In this respect, *Butler* v. *Michigan*, 352 U.S. 380 (1957), which involved the sale of a book, is quite different. In that context, means are available for reliably separating adults from children at the point of sale. In this context, Congress properly determined that no such means are available.

statute's reach. And, significantly, adults remain free to purchase recordings containing the identical messages at book or record stores, where access to minors is much more easily restricted. See *Pacifica*, 438 U.S. at 750 n.28 ("[a]dults who feel the need may purchase tapes and records • • • to hear these words"). Thus, contrary to the district court's suggestion (App., *infra*, 4a), Section 223(b) clearly does not reduce "the adult population" to hearing "only what is fit for children." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

Second, the court's conclusion that the statute is not narrowly drawn is fundamentally inconsistent with Congress's determination, based on the FCC's four-year experience receiving comments on and drafting and defending regulations, that children would continue to gain access to pornographic messages as long as commercial enterprises continued aggressively to distribute such messages over the national telephone system. That congressional determination is entitled to substantial deference. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); *Rostker* v. *Goldberg*, 453 U.S. 57, 83 (1981). It is also supported by the FCC's observations that "[n]o method guarantees that some enterprising minors will never hear the messages" (*Second Report*, 50 Fed. Reg. at 42706) and that "absolute impossibility of access to [dial-a-porn] services by minors is not feasible" (*Third Report*, 2 F.C.C. Rcd at 2724 n.14). The pervasiveness of the access that children have to telephones means that an outright ban *is* the narrowest alternative available to prohibit access to dial-a-porn by all children.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RICHARD G. TARANTO
Assistant to the Solicitor General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

SEPTEMBER 1988

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 88-3353 AWT

SABLE COMMUNICATIONS OF CALIFORNIA, INC., ETC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., DEFENDANTS

[Filed July 19, 1988]

MEMORANDUM DECISION

BACKGROUND

Effective July 1, 1988, 47 U.S.C. § 223(b) was amended by the Telephone Decency Act to provide:

(1) Whoever knowingly

(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person; or

(B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(2) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3)(A) In addition to the penalties under paragraphs (1) and (2), whoever in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either—

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

Plaintiff, a major purveyor of 976 IAS dial-a-porn messages, has moved for a preliminary injunction (the parties having stipulated that pending the hearing, defendants will not enforce § 223(b) against plaintiff).

A concrete controversy exists. *See Sable Communications, Inc.* v. *FCC*, 827 F.2d 640 (9th Cir. 1987) (addressing challenge to pre-amended § 223(b)). In fact, plaintiff has been "chilled"—it has "softened" its messages. Since invasion of First Amendment rights is at issue, plaintiff has unquestionably met the irreparable injury requirement. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).

INDECENT SPEECH

What is at issue is the breadth to be given to *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978). The Court concludes that *Pacifica* does not reach § 223(b); thus, that in the final analysis the statute in its present form is overbroad and unconstitutional, at least insofar as it applies to "indecent" communications.

First, *Pacifica* itself emphasized its own narrowness. *Id.* at 750-51. The narrowness of *Pacifica*'s holding was reiterated by the Court in *Bolger* v. *Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983). As the Second Circuit noted:

> *Bolger* thus singles out the broadcasting media as subject to a "special interest of the federal government in regulation" that "does not readily translate into a justification for regulation of other means of communication."

Carlin Communications, Inc. v. *FCC*, 749 F.2d 113, 120 (2d Cir. 1984) (quoting *Bolger*, 463 U.S. at 74). *See also Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985) (*Pacifica* does not apply to cable television).

This narrow reading of *Pacifica* is consistent with Ninth Circuit precedent. "The First Amendment does not permit

a flat-out ban of indecent as opposed to obscene speech; the adult population may not be reduced to 'hearing only what is fit for child[ren].' " *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987) (quoting *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957)), *cert. denied*, 108 S. Ct. 1586 (1988).

While the government unquestionably has a legitimate interest in, *e.g.*, protecting children from exposure to indecent dial-a-porn messages, § 223(b) is not narrowly drawn to achieve any such purpose. Its flat-out ban of indecent speech is contrary to the First Amendment. *Mountain States Tel.*, 827 F.2d at 1296.

OBSCENE SPEECH

On the other hand, obscene speech is unprotected by the First Amendment. *Miller* v. *California*, 413 U.S. 15 (1973). Plaintiff does not argue against this well-established proposition. Rather, plaintiff contends that § 223(b) abolishes *Miller*'s community standard requirement and, in effect, establishes a single national standard, subjecting its dial-a-porn messages to the most puritanical standard that exists anywhere in the country. The Second Circuit has already addressed this contention and found it wanting:

> We are also unpersuaded by Carlin's remaining facial constitutional challenge to section 223(b). The statute does not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, or the broadcasting of obscene messages.

Carlin Communications, Inc. v. *FCC*, 837 F.2d 546, 561 (2d Cir. 1988) (addressing pre-amended § 223(b)) (citations omitted). In light of this square holding (the amendment of § 223(b) does not affect the validity of the Second

Circuit's analysis), the Court concludes that plaintiff cannot meet even the alternative test—that a serious question is raised. *American Motorcyclist Ass'n* v. *Watt*, 714 F.2d 962, 965 (9th Cir. 1983). More importantly, if a preliminary injunction were to issue, it would mean that plaintiff would be free to transmit obscene dial-a-porn messages. Beyond doubt the public interest would be disserved by such a preliminary injunction and effect on the public interest is a factor which the Court must consider. *Id.* at 967.

SEVERABILITY

In view of these divergent conclusions on the two parts of § 223(b), the Court must next consider whether the "obscene" and "indecent" components of the statute are severable from each other—whether Congress would have enacted the one without the other. An unconstitutional provision is presumptively severable and that presumption should be applied. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (White, J.) (citations omitted). *See also Brockett* v. *Spokane Arcade, Inc.*, 472 U.S. 491 (1985) (applying "normal" rule of severability to First Amendment case to sever "lust" from other constitutional anti-obscenity statute). Here, no reason appears, certainly not at the preliminary injunction stage, not to apply the normal rule of severability.

CONCLUSION

For the foregoing reasons, a preliminary injunction shall issue prohibiting enforcement of § 223(b) as to any communication alleged to be "indecent." The motion for a preliminary injunction is otherwise denied.

Dated: July 19, 1988

/s/ A. Wallace Tashima

A. WALLACE TASHIMA
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 88-3353 AWT

SABLE COMMUNICATIONS OF CALIFORNIA, INC., ETC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., DEFENDANTS

[Filed July 19, 1988]

PRELIMINARY INJUNCTION

In accordance with the Memorandum Decision signed and filed concurrently herewith,

IT IS ORDERED that defendants, and each of them, and their respective officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them who receive actual notice of this preliminary injunction by personal service or otherwise, are restrained and enjoined from enforcing 47 U.S.C. § 223(b) against any allegedly "indecent" communication, including the initiation or continuation of any criminal, civil or administrative investigation, action or proceeding, pending the determination of this action on the merits.

Agreeably with the parties, no security shall be required under F. R. Civ. P. 65(c).

Dated: July 19, 1988

/s/ A. Wallace Tashima

A. WALLACE TASHIMA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 88-3353 AWT (JRX)

SABLE COMMUNICATIONS OF CALIFORNIA, INC., PLAINTIFF

v.

FEDERAL COMMUNICATIONS COMMISSION AND EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

[Filed July 29, 1988]

NOTICE OF APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 29th day of July, 1988, that the defendants Federal Communications Commission and Edwin Meese III, Attorney General of the United States, hereby appeal to the Supreme Court of the United States from the order granting a preliminary injunction and accompanying memorandum opinion of this Court entered on July 19, 1988, in favor of the plaintiff and against the defendants, granting plaintiff's motion for a preliminary

injunction in part and striking down the Telephone Decency Act of 1988, 47 U.S.C. § 223(b), insofar as that statute prohibits indecent commercial telephone messages.

This appeal is taken pursuant to Title 28, United States Code, section 1252.

Respectfully submitted,

JOHN R. BOLTON
Assistant Attorney General

ROBERT C. BONNER
United States Attorney

CAROLYN REYNOLDS
Assistant U.S. Attorney

/s/ Theodore C. Hirt
THEODORE C. HIRT

/s/ Robert C. Chesnut
ROBERT C. CHESNUT

Attorneys, Department of Justice
Civil Division, Rm. 3738
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530

Of Counsel:

DIANE S. KILLORY
General Counsel

SUE ANN PRESKILL
Attorney

Federal Communications Commission
1919 M. St.
Washington, D.C. 20554

H. ROBERT SHOWERS
PAUL C. MCCOMMON III

Attorneys, Department of Justice
Criminal Div. Room 2215
10th & Pennsylvania Ave.,
Washington, D.C. 20530

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No. 88-525

In The

Supreme Court of the United States

October Term, 1988

FEDERAL COMMUNICATIONS COMMISSION AND EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Appellants and Cross-Appellees,

v.

SABLE COMMUNICATIONS OF CALIFORNIA INC.,

Appellee and Cross-Appellant.

On Appeal From the United States District Court for the Central District of California

MOTION OF APPELLEE AND CROSS-APPELLANT SABLE COMMUNICATIONS OF CALIFORNIA INC. TO DISMISS OR TO AFFIRM IN PART

RICHARD K. SIMON
Counsel of Record
LEE L. BLACKMAN
McDERMOTT, WILL & EMERY
2029 Century Park East
Suite 3800
Los Angeles, CA 90067
(213) 277-4110

LAWRENCE E. ABELMAN, ESQ.
NORMAN S. BEIER, ESQ.
ABELMAN FRAYNE REZAC & SCHWAB
708 Third Avenue
New York, New York
10017-4141
(212) 949-9022

Attorneys for Appellee and Cross-Appellant

October 27, 1988

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question presented by this motion is whether this appeal from a District Court decision holding unconstitutional that portion of an act of Congress (47 U.S.C. § 223(b)) imposing criminal and civil penalties upon presumptively protected "indecent" speech raises questions sufficiently substantial as to require further argument.

PARTIES

All parties are listed in the caption of this motion. Affiliates of appellee and cross-appellant Sable Communications of California Inc. are:

Carlin Communications, Inc.
Saphire of Arizona, Inc.
Joy Communications of California, Inc.
Lynx Communications of California Inc.
Sapphire of Colorado Inc.
Sapphire Communications of Florida, Inc.
Sapphire of Georgia Inc.
Sapphire of Iowa, Inc.
Sapphire of Communications of Kentucky, Inc.
Sapphire of Louisiana Inc.
Joy Communications of Maryland Inc.
Joy Communications of Michigan Inc.
Sapphire of Michigan Inc.
Sapphire of Minnesota Inc.
Sapphire of Nebraska Inc.
Sapphire of Nevada Inc.
Sapphire of Oregon Inc.
Joy Communications of Pennsylvania Inc.
Sapphire Communications of Pennsylvania Inc.
Sapphire Communications of Texas Inc.
Sapphire of Virginia Inc.
Sapphire of Washington Inc.
Sapphire of Washington D.C. Inc.

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U.S. Const. First Amendment 2

No. 88-525

In The

Supreme Court of the United States

October Term, 1988

FEDERAL COMMUNICATIONS COMMISSION AND EDWIN MEESE III, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Appellants and Cross-Appellees,

v.

SABLE COMMUNICATIONS OF CALIFORNIA INC.,

Appellee and Cross-Appellant.

On Appeal From the United States District Court for the Central District of California

MOTION OF APPELLEE AND CROSS-APPELLANT TO DISMISS OR TO AFFIRM IN PART

Pursuant to Rule 16.1, appellee and cross-appellant Sable Communications of California Inc. moves to dismiss the appeal filed on behalf of the Federal Communications Commission and the Attorney General of the United States (collectively "the Government") or, in the alternative, to affirm that portion of the District Court decision holding 47 U.S.C. § 223 (b) unconstitutional. This motion is based on the ground that the position advanced by the Government represents so substantial a departure

from settled authority, including recent decisions of this Court, as to present no issue warranting further argument.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech * * *."

Section 223(b) of the Communications Act of 1934, as amended effective July 1, 1988, provides:

> (b)(1) Whoever knowingly-
>
> (A) in the District of Columbia or in interstate or foreign communications, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.
>
> (2) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3)(A) In addition to the penalties under paragraphs (1) and (2), whoever, in the District of Columbia or in

interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either-

(i) by a court, pursuant to a civil action by the [Federal Communications] Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

ARGUMENT

The Government appeals from the decision of the District Court for the Central District of California (the Honorable A. Wallace Tashima) holding "overbroad and unconstitutional," and preliminarily enjoining enforcement of, that portion of 47 U.S.C. § 223(b) purporting to ban "indecent" communications.[1] The District Court declined to enjoin enforcement of the balance of the statute, which it held to be severable from the unconstitutional element.[2] The Government urges reversal on two

[1] The full text of the District Court decision appears as Appendix A to each of the parties' Jurisdictional Statements.

[2] This portion of the District Court's decision is the subject of cross-appeal No. 88-515.

grounds: that the "indecency" provision of section 223(b) falls within the ambit of this Court's reasoning in *FCC v. Pacifica Foundation*, 438 U.S. 726, *rehrng. den.* 439 U.S. 883 (1978) ("*Pacifica*") and that, in any event, the federal government's interest in preventing minors' access to adult communications justifies an extension of *Pacifica's* rationale to the medium and the communications at issue here.

Through repeated references to the allegedly "pornographic" nature of such communications and through the invocation of Congressional hearsay, the Government's Jurisdictional Statement seeks to muddy the clear distinction drawn in multiple decisions of this Court between obscene speech and protected non-obscene speech, thus glossing over the fact that if upheld *in toto* section 223(b) would, for the first time, permit criminal prosecution for "indecent" communications.[3]

1. In *Pacifica*, the Court let stand an FCC order holding a licensee's broadcast to be "indecent" under 18 U.S.C. § 1464 and imposing no sanction but incorporating its findings in the licensee's FCC file.[4]

More recently in *Bethel School District v. Fraser*, 478 U.S. 675 (1985), the Court upheld the School District's

---

[3] Such prosecutions have heretofore been permitted only where the term "indecent" was held to be coextensive with "obscene" within the meaning of *Miller v. California*, 413 U.S. 15 (1973). *See, Hamling v. United States*, 418 U.S. 87, 110 (1974).

[4] The FCC was careful to point out that it did not by its actions seek to prohibit broadcasts deemed indecent, but merely to "channel" them to more acceptable times of day. 438 U.S. at 732-733.

suspension of a student for an "indecent" speech to a student assembly, noting, in particular, the limited sanction involved:

> "Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution." *Id* at 686.

The Government's attempt to bring section 223(b), with its penalties of up to $50,000 and six months' imprisonment (the former for each day of violation), within the reasoning underlying these decisions is both disingenuous and dangerous. The issue is not whether the media involved are comparable (they are not, for the reasons discussed *infra*), but whether the expressly "narrow" holding in *Pacifica* (438 U.S. at 750) provides any support for the Government's position. One need only consider the application of section 223(b)'s draconian sanctions to the "indecent" speech reproduced in Justice Brennan's concurring opinion in *Bethel, supra*, to recognize that the Government here seeks not a natural extension of *Pacifica* or *Bethel* but a drastic constriction of First Amendment protections far beyond the boundaries of any decision of this Court.

Virtually every court, including this one, which has considered the issue has refused to extend the *Pacifica* holding, even in analogous circumstances. *See, e.g., Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164 (D. Utah 1982); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983); *Community Television v. Wilkinson*, 611 F.Supp. 1099, 1108 (D.C. Utah 1985), *aff'd, sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985),

Carlin Communications, Inc. v. F.C.C., 837 F.2d 546 (2d Cir. 1988), petition for cert. pending ("Carlin III"). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 43 (D.C. Cir.), *cert. den.*, 434 U.S. 829 (1977).

In *Bolger, supra*, the Court struck down a federal statute which prohibited the unsolicited mailing of contraceptive advertisements. Rejecting the government's argument that the statute protected recipients of mail from offensive materials, the Court stated:

> "The First Amendment 'does not permit the government to prohit speech as intrusive unless the "captive" audience cannot avoid objectionable speech.' " 463 U.S. at 72. [citation omitted]

The Court noted in particular that

> "The special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication."
> *id.* at 74 (footnote omitted).

In *Cruz, supra*, the Court refused to extend the *Pacifica* rationale even to cable television, reasoning that "parental manageability of cable television greatly exceeds the ability to manage the broadcast media." 755 F.2d at 1420.

Most recently, in *Carlin III, supra*, the Second Circuit specifically noted that "*Pacifica* did *not* decide that the indecent broadcast 'would justify a criminal prosecution.' " 837 F.2d at 560.

Even those responsible for enforcement of section 223(b) acknowledge that its total ban on, and criminalization of, indecent speech is far beyond the bounds and

intent of *Pacifica*. *See* Government Jurisdictional Statement, page 14, ftnt. 9. The Government's dismissal of the views of the FCC General Counsel as mere "predictions of likely judicial rulings" is also inaccurate. Those views take into account not only the result in *Pacifica* but also its reasoning, affirmed in the many decisions cited *supra*, that the nature and circumstances of radio broadcasts are unique, that access to messages on that medium is often involuntary and, most importantly, that the sanctions imposed by the FCC were *de minimis*.

In attempting to use *Pacifica* as a springboard to criminal prosecution of non-obscene speech, the Government thus seeks a departure not only from the narrow holding in that case but also from its reasoning and its grounding in constitutional principles.

2. In emphasizing that Congress did not intend the term "indecent" as used in 18 U.S.C. § 1464 to be synonymous with "obscene," the Court in *Pacifica* noted that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality" (*Id.* at 740), citing the definition found in Webster:

> "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality: . . ."
> *Ibid.*, ftnt. 14

It is undisputed that section 223(b)'s use of "indecent" (both as originally enacted and as amended) "was clearly made with [*Pacifica*] in mind" *Carlin III*, *supra* at 558. See, Government's Jurisdictional Statement, p. 10. No decision cited by the Government, nor any of which

appellee is aware, even suggests that the application of criminal sanctions would be constitutionally permissible in such a context.

"It is a basic principal of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294 (1972). Due process requires that laws provide notice to the ordinary person of what is prohibited and provide standards to law enforcement officials to prevent arbitrary and discriminatory enforcement. *Postscript Enterprises, Inc. v. Whaley*, 658 F.2d 1249, 1254 (8th Cir. 1984). Statutes designed to regulate speech, in particular, must be carefully limited to avoid infringement of First Amendment rights. As this Court noted in *Miller v. California, supra*:

> "We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression . . . statutes designed to regulate obscene materials must be carefully limited. (Citations omitted.) As a result, we now confine the permissible scope of such regulations to works which depict or describe sexual conduct. The conduct must be specifically defined by the applicable [law] as written or authoritatively construed." At 23-24.

Thus even if, as the Government would have it, the many differences between the limited spectrum and involuntary intrusiveness of radio broadcasts on the one hand and media such as cable television and the telephone on the other, recognized in *Cruz v. Ferre, supra, Home Box Office, Inc. v. FCC, supra, Carlin III, supra*, and *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 120 (2nd Cir. 1984), are disregarded, section 223(b) would still fail to meet constitutional criteria to the extent it criminalizes

speech outside the ambit of *Miller* and *Ginsberg v. New York*, 390 U.S. 629 (1968). *Pacifica* clearly offers no support for such a departure from the holdings of this Court.

The Government does not address this issue directly, referring instead to congressional determination to bar "pornographic" messages accessed by minors. This begs, or blurs, the question. To the extent Congress is entitled so to act, it has done so in enacting section 223(b)'s ban on "obscene" communications. To go beyond the *Miller* and/or *Ginsberg* obscenity standards requires, first, a reevaluation by this Court of the limits of First Amendment protection and, second, adoption of a new category of unprotected speech more clearly delineated than "indecent." Neither of these considerations is acknowledged in the Governmant's Jurisdictional Statement, and certainly neither flows from *Pacifica*, however broadly construed.

3. The Government invokes *Ginsberg v. New York*, *supra*, for the undisputed proposition that the well-being of children is a legitimate legislative objective. The Court in that case held that a state could establish an obscenity standard for materials sold to minors differing from that governing adult materials. A more stringent obscenity standard is, however, a far cry from the use of "indecent" as defined by the Court in *Pacifica* and adopted by Congress in section 223(b) as a basis for criminal prosecution. Moreover, the *Ginsberg* case did not present a situation where adult access to materials would be impeded. Hence, there was no danger that the legislation would "reduce the adult population . . . to reading only what is fit for children" (*Butler v. Michigan*, 352 U.S. 380, 383 (1947)), the result which the Government candidly

acknowledges (Jurisdictional Statement, page 23, ftnt. 15) would prevail if section 223(b) were upheld.

CONCLUSION

For the foregoing reasons, appellee respectfully submits that the question upon which this appeal arises is so insubstantial as to need no further argument, and moves the Court to dismiss this appeal or, in the alternative, to affirm the portion of the decision of the District Court for the Central District of California holding unconstitutional the "indecency" standard set forth in 47 U.S.C. 223(b).

Dated: October 27, 1988

McDermott, Will & Emery
Richard K. Simon
Lee L. Blackman

Richard K. Simon
Attorneys for Plaintiff
Sable Communications
California, Inc.

Supreme Court, U.S.
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No. 88-525

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES,
Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellee.

On Appeal from the United States District Court for the Central District of California

---

BRIEF OF AMICI CURIAE JANE ROE, JOHN DOE, INC. AND THE CONSENTING ADULTS TELEPHONE RIGHTS ASSOCIATION IN SUPPORT OF APPELLEE

BRUCE J. ENNIS
(Counsel of Record)
KIT ADELMAN-PIERSON
JOHN T. NAKAHATA
JENNER & BLOCK
21 DuPont Circle, N.W.
Washington, D.C. 20036
Telephone: (202) 223-4400
Attorneys for Amici

Of Counsel:
NEIL I. ADELMAN
RICHARD D. EMERY

October 27, 1988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-525

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES,

Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,

Appellee.

On Appeal from the United States District Court for the Central District of California

---

BRIEF OF AMICI CURIAE JANE ROE, JOHN DOE, INC. AND THE CONSENTING ADULTS TELEPHONE RIGHTS ASSOCIATION IN SUPPORT OF APPELLEE

INTEREST OF AMICI *

Amici Jane Roe, John Doe, Inc., and Consenting Adults Telephone Rights Association ("CATRA") are the plaintiffs in *Roe v. Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988), in which the court granted a preliminary injunction against enforcement of the same "indecency" prohibition at issue in this appeal. *Amici* are all involved in the business of engaging in or facilitating live, private, two-way telephone conversations, often of a frankly sexual nature, with adults who request such conversations and

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* Appellant and Appellee have both consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

pay for them in advance by credit card.[1] Such conversations range in length from ten to thirty minutes. Typically, about half the conversation is sexually oriented.[2]

Amici filed suit in New York at virtually the same time appellee Sable filed the instant litigation in California. Although engaged in a different business from Sable—live conversations rather than pre-recorded messages—*amici* were similarly threatened with prosecution and civil proceedings under 47 U.S.C. (Supp. III) § 223(b), as amended. *Amici* obtained preliminary injunctive relief similar to that obtained by Sable.[3]

Although the Government acknowledges that the live service provided by *amici* is "unlike" the service provided by pre-recorded message companies, *see* Jurisdictional Statement at 4, n. 4 ("J.S."), and although the Government has chosen, apparently for tactical reasons, to appeal only the Sable injunction, the questions presented in the government's appeal (and in Sable's cross-appeal) encompass both live conversations pre-paid by credit card and the pre-recorded messages at issue in the *Sable* litigation. Thus, a ruling by this Court could directly affect the relief *amici* have obtained in their case.

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[1] Jane Roe is a pseudonym for an adult resident of New York. John Doe, Inc., is a pseudonym for a New York corporation. CATRA is an association, all of whose members are engaged in the business described in text. CATRA sued in the district court and appears here on its own behalf and on behalf of its members.

[2] One objective of this business is to develop a personal relationship with the caller so that he will call back and request the other party to the conversation by name. Consequently, the conversations typically include non-sexual subject matter, such as the caller's personal life, occupation, interests in sports or politics, etc.

[3] "We preliminarily enjoin enforcement of 47 U.S.C. § 223(b) as it pertains to 'indecent' speech and permanently enjoin enforcement of this statute if such enforcement proceeding is based on 'indecent' conversations occurring while the preliminary injunction is in effect. All relief requested relating to 'obscene' conversations is denied." *Roe v. Meese*, 689 F. Supp. at 348.

Amici will present two arguments the parties are not expected to make.

SUMMARY OF ARGUMENT

Appellant bases its argument that this Court should accord plenary consideration to its appeal on the claim that, like the mid-afternoon radio broadcasts at issue in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), so-called "dial-a-porn" messages are "readily accessible to minors." J.S. at 22. *See, e.g.*, J.S. at 5, 11, 18, 19, 21, 23 and 24. But Appellant ignores the fact that on three separate occasions the FCC has ruled that minors have "virtually no access" to live telephone services that require pre-payment by credit card, which are fully subject to the statutory prohibition of indecent speech here at issue. Indeed, there is no evidence in the administrative, congressional, or judicial record (including the records in the instant case and *Roe v. Meese, supra*) that *any* minor has ever gained access to a live, credit card service. For that and several other reasons, *Pacifica* is inapposite and § 223(b) is unconstitutional as applied to live, credit card services. Accordingly, even if a total ban of indecent *pre-recorded* messages would be constitutional, § 223(b)'s manifest and substantial overbreadth renders it void on its face. *E.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The Court should therefore dismiss this appeal for want of a substantial federal question or should summarily affirm the "indecency" ruling rendered below. Point I.

Moreover, it may prove unnecessary, in the present appeal and cross-appeal, to decide the constitutional questions presented by the parties. Because Sable derives no revenue and no commercial advantage from interstate calls to its pre-recorded message service, the rule of lenity and the maxim that statutes should be construed to avoid constitutional difficulties may place Sable's conduct outside the ambit of the statutory prohibition on obscene or indecent interstate telephone calls made "for commer-

cial purposes." If the Court does grant plenary consideration to the appeal and cross-appeal, therefore, it should direct the parties to brief this statutory issue as well as the constitutional questions framed in their jurisdictional statements. Point II.

I. CONTRARY TO THE APPELLANT'S CLAIM, SECTION 223(b)'S PROHIBITION OF "INDECENT" SPEECH CRIMINALIZES A SUBSTANTIAL AMOUNT OF SPEECH THAT IS CONSTITUTIONALLY PROTECTED FOR ADULTS AND IS VIRTUALLY INACCESSIBLE TO MINORS. BECAUSE THAT PROHIBITION IS PLAINLY OVERBROAD, THIS COURT SHOULD DISMISS THIS APPEAL FOR FAILURE TO PRESENT A SUBSTANTIAL FEDERAL QUESTION OR SHOULD SUMMARILY AFFIRM THE LOWER COURT'S "INDECENCY" RULING.

Appellant argues that speech that is constitutionally protected for adults (albeit "indecent") can nevertheless be prohibited entirely in order to ensure that minors will not gain access to it. Crucial to Appellant's argument is its assertion that the speech proscribed by section 223(b) "is readily accessible to minors." J.S. at 22. In reality, however, minors have virtually no access to live, one-to-one telephone services that can be accessed only by a caller having a credit card, which constitute a substantial amount of the constitutionally protected speech criminalized by section 223(b). Accordingly, even assuming, *arguendo*, that Congress could constitutionally prohibit indecent speech that is "readily accessible" to minors,[4]

---

[4] *Amici* do not suggest that children's ease of access to a given kind of speech, without more, would justify criminalization of "indecent" speech of that type. *Butler v. Michigan*, 352 U.S. 380 (1957), among other decisions, holds to the contrary. Ease of access, however, is certainly a necessary, though not sufficient, condition precedent to such criminalization. Therefore, *amici* strongly believe section 223(b) is unconstitutional even with respect to *pre-recorded* messages, although it will not be necessary for the Court

section 223(b)'s ban on all "indecent" speech is overbroad and thus unconstitutional on its face. Just as the government cannot categorically proscribe and criminally punish constitutionally protected—but "indecent" —movies, books and magazines because of the risk that minors might occasionally gain access to them, it cannot ban all "indecent" interstate telephone calls made for a commercial purpose, at least when a substantial number of these are live calls pre-paid by credit card.

A. The Government May Not Prohibit And Criminalize "Indecent" Live, Private, Two-Way Telephone Conversations Between Consenting Adults Paid For In Advance By Credit Card.

When Congress originally passed section 223(b) in 1983, it directed the FCC to issue regulations providing defenses to prosecution when a telephone message service had taken steps that effectively prevented minors from having access to that service. In promulgating those regulations, the FCC consistently has recognized the important differences between live telephone services paid for by credit card holders, and pre-recorded message services (which cannot practicably impose a credit card requirement).[5] Appellant's effort to condemn *all* "dial-a-porn" on the ground that it is "readily accessible" to minors

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to resolve that question if *amici's* arguments are accepted. Moreover, it should also be noted that the FCC has recently found that new technology may make it possible effectively to limit access by children even to *pre-recorded* messages. *See* n.11, *infra*.

[5] In 1983, the FCC determined that live services could comply with section 223(b) by requiring payment by credit card before permitting access to their services. Even before that decision, most live services imposed such a requirement. In the case of pre-recorded message services, however, the FCC has determined that such a requirement "would be impractical, as those services allow multiple calls to access a message simultaneously." *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 49 Fed. Reg. 24996, 24998 (1984) (hereafter *"First Report and Order"*).

ignores these critical differences, and fails to heed Appellant's own warning that "careful analysis of context is necessary before the reasoning of *Pacifica* is extended outside the broadcasting context." J.S. at 18.

Contrary to Appellant's suggestion, gaining access to live services is certainly not "as easy as turning on a radio or television set . . . even for young children." J.S. at 18. In fact, the regulatory and congressional record makes clear that minors have *virtually no access* to live, two-way services accessed only by use of a credit card.

The FCC reached this conclusion on three separate occasions after careful investigation and "based upon [its] four-year experience receiving comments on and drafting and defending regulations." J.S. at 24. In its *First Report and Order*, the FCC concluded that:

> imposition of a credit card restriction upon [live] "dial-a-porn" providers *will effectively ensure that minors are denied access to such services.* The age requirement for obtaining a credit card combined with the fact that minors who are issued credit cards are usually subject to parental supervision as to use of the card, should effectively prevent access by underage callers.

First Report and Order at 25001 (emphasis added).[6]

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[6] The FCC's decision on this point was upheld by the United States Court of Appeals for the Second Circuit in *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 118-19 (2d Cir. 1984). In addition to requiring payment by credit card, live services take other steps to prevent access by minors. For example, it is common practice for live services to ask a caller if he has a telephone listed in his own name, and then verify that fact through directory service before authorizing service for the caller. If the caller does not have a listing in his own name, no service will be provided. Independent of such screening techniques, the cost of access to live services—which is approximately $35-$50, as opposed to a few dollars for services that provide pre-recorded messages—is likely to dissuade minors from using live services, particularly since this cost will later appear on a credit card bill sent to the home.

In October 1985, after receiving numerous comments from interested persons and after "careful consideration of the record," the FCC again determined that requiring payment by credit card effectively restricts minors' access to live services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order*, 50 Fed. Reg. 42699, 42701, 42706 (1985) ("*Second Report and Order*"). The FCC explained:

> In our [First] Report and Order we concluded that requiring prepayment by credit card effectively restricts minors' access to live "dial-a-porn" transmissions. . . . [N]ot finding any reason to reach a contrary conclusion in the augmented record, we find that this credit card provision is a suitable adjunct to the regulation we adopt today regarding recorded messages.

Id. at 42706. In its *Third Report and Order*, the FCC reached the same conclusion for the third time, finding that requiring pre-payment by credit card would ensure that minors would have "virtually no access" to live services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd. 2714, 2724 n.14 (1987).[7]

Throughout the FCC's three investigations there was *no evidence*, or even claim, that *any* minors have gained access to live, credit card services. In its *Second Report and Order* the FCC stated that "*no party submitting*

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[7] Indeed, the FCC considered itself bound by its statutory mandate to approve measures designed to screen out minors *only* if those measures would be "highly effective" and would ensure that minors would have "virtually no access" to adult telephone services: "As we interpret this statute, a *high degree of effectiveness* is contemplated so that if access is restricted to adults, as stated by the statute, minors will have *virtually no access to adult message services.*" *Third Report and Order*, 2 F.C.C. Rcd. at 2724 n.14 (emphasis added).

comments in this proceeding claims that the credit card restriction is ineffective to meet the mandate of Congress." *Second Report and Order*, 50 Fed. Reg. at 42706, n.56 (emphasis added).[8]

Similarly, throughout the congressional hearings and debates on section 223(b) as enacted and on proposed amendments, there was not a single claim of even one minor gaining access to live, credit card services. To the contrary, the legislative activity surrounding section 223(b) overwhelmingly focused on concerns about minors' access to *pre-recorded* message services, and *every* cited example of minors' access involved a *pre-recorded* message.

Perhaps most telling of all, in this litigation and in the New York litigation filed by *amici* (which focuses specifically on live services), the Government has failed to offer even a single complaint that a minor gained access to a live, credit card service. Accordingly, in the context of live services, there is no basis whatsoever for Appellant's contention that indecent speech is "readily accessible" by minors.

Appellant must therefore claim that access by minors, though "virtually" impossible, is not "totally" or "absolutely" impossible. J.S. at 24.[9] But the fact that it is

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[8] Nothing in the *Third Report and Order*, which reaffirmed the credit card requirement, suggests that any such evidence or claim was submitted during that investigation.

[9] Appellant's argument appears to be that even if a credit card requirement would be an "effective" way to prevent access by minors, as the FCC has repeatedly found, that requirement would not "totally" or "absolutely" preclude access by minors. In Appellant's view, total effectiveness is a "valid" legislative goal that justifies abridgment of adults' rights to have access to non-obscene speech: "And, given the nature of the telephone system, the lesser measures proposed by the FCC in its rulemaking proceedings, *effective as they might have been*, could not achieve the valid end of *totally* precluding access by minors." J.S. at 23 (emphasis added). *See id.* at 24 (stressing FCC statement that no requirement can

not "totally" impossible for minors to gain access to constitutionally protected "indecent" speech cannot justify a wholesale prohibition of that speech. If government could constitutionally prohibit "indecent" speech unless it were absolutely certain that no minor could ever gain access to that speech, it could prohibit *all* "indecent" speech—or other speech deemed potentially harmful to minors—in *all* media. To preserve adult access to speech that is protected for adults, the First Amendment requires that we accept some risk that minors may occasionally gain access to it. We permit adults to watch "R" rated movies while recognizing that minors may occasionally sneak in to see those movies; we permit adults to rent videotapes for home viewing that are "indecent" or even obscene as to minors while recognizing that some adults may permit minors to view those movies, or that minors may gain access without permission clandestinely or through a ruse; and we permit adults to purchase books and magazines with sexually explicit or otherwise "indecent" content even though some minors will inevitably gain access to these materials.

Indeed, this Court has consistently rejected the proposition that government can prohibit speech protected as to adults in order to insure that no minor will ever gain access to it. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court squarely rejected the State's assertion that it could "quarantin[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." 352 U.S. at 383. The Court explained that this legislative approach was "not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." *Id.* Similarly, in *Bolger v. Youngs Drug*

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guarantee "absolute impossibility of access," but ignoring preceding sentence making clear FCC believed credit card requirement guaranteed "virtually no access").

Products Corp., 463 U.S. 60 (1983), this Court struck down a statute that prohibited unsolicited mailing of contraceptive advertisements despite the Government's claim that some minors could gain access to these materials. The Court explained that "a restriction of this scope is more extensive than the Constitution permits. . . . The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 73-74 (citation omitted).

Recently in *Wilkinson v. Jones*, 107 S. Ct. 1559 (1987), this Court reviewed the Tenth Circuit's holding that a statute banning "indecent" cable television programming violated the First Amendment. Before the lower courts and on appeal to this Court, the State argued that outright prohibition of "indecent material" on cable television was necessary to protect children. Both the District Court and Court of Appeals rejected the State's contention and found that the statute unconstitutionally impaired the First Amendment rights of adults. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985); *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). This Court summarily affirmed the lower courts' decision striking down the statute. *Wilkinson v. Jones*, 107 S. Ct. 1559 (1987).[10]

Just last term, this Court confirmed that statutes affecting speech must be narrowly tailored, and explained that a statute is narrowly tailored *only* "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Shultz*, 108 S. Ct. 2495, 2502 (1988) (citing *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810

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[10] *Accord Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (affirming lower court's decision to enjoin enforcement of ordinance prohibiting cable distribution of any "obscene or indecent material"); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (holding statutory prohibition of "indecent" cable programming unconstitutional).

(1984)). Furthermore, the *Frisby* Court confirmed that a "complete ban" on speech can be justified "only if *each activity* within the proscription's scope is an appropriately targeted evil." *Id.* (emphasis added).

Section 223 cannot survive scrutiny under *Frisby*, *Wilkinson*, *Bolger* and *Butler*. Here, Appellant does not even argue that *adult* access to "indecent" speech is an evil that Congress could separately target and proscribe. Instead, the statute bars all adult access solely for the purpose of remedying minors' alleged access to some indecent speech. Even if a complete ban on pre-recorded messages were necessary to prevent minors' access to them—a contention *amici* dispute—it is uncontrovertible that the statute's outright ban on live, credit card services is *not* necessary, because minors have virtually no access to them. Accordingly, section 223(b)'s complete ban on "indecent" speech violates the First Amendment because it is not narrowly tailored to proscribe the only evil—access by minors—Appellant contends Congress could constitutionally proscribe.

Faced with the weight of these authorities, Appellant tries to argue that the criminal prohibition at issue here is similar to the broadcasting regulation upheld in *Pacifica*. In *Pacifica*, this Court explicitly "emphasize[d] the narrowness of our holding," 438 U.S. at 750, a point the Court later reemphasized in *Bolger*. 463 U.S. at 74. Virtually ignoring the differences between *Pacifica* and the issues presently before the Court, Appellant now asks for a dramatic expansion of that narrow holding. But the distinctions between the time-channeling regulation reviewed in *Pacifica* and a criminal prohibition of "indecent" speech by live telephone services are clear and substantial:

(1) The broadcast speech at issue in *Pacifica* was "uniquely accessible to children," 438 U.S. at 749, who simply had to overhear or turn on a radio. *Pacifica*

stressed the "ease with which children may obtain access to broadcast material." *Id.* In contrast, minors have virtually no access to live, credit card services.[11] Moreover, the substantial control parents exercise over access by their children to credit cards, *see First Report and Order* at 25001; *cf. Bolger*, 463 U.S. at 73 (parental control over incoming mail), contrasts sharply with the difficulty of parental control over children's access to radio in the early afternoon, *Pacifica*, 438 U.S. at 732 (quoting the FCC).

(2) Although Appellant argues that the "similarity" of telephone services to broadcasting is "underscored" because messages can be provided to thousands of callers "simultaneously," J.S. at 20, that claim is not true in the case of live telephone services paid for by credit card. To the contrary, persons using these services participate in individualized, private conversations.[12]

(3) Section 223(b) imposes criminal penalties, including substantial fines and imprisonment. The regulation upheld in *Pacifica* involved only administrative action, and the Court expressly noted that it was *not* deciding

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[11] The FCC also believed that new technology could serve a similar function for pre-recorded services. *See Third Report and Order* at 2721-22. If this Court were otherwise to agree with Appellant that ease of access to pre-recorded services would render the statute constitutional as applied to such services (a ruling that would depart substantially from this Court's prior decisions), and for some reason were to reject *amici's* overbreadth argument, then this Court in deference to the FCC should affirm the preliminary injunction in the instant case and remand for fact-finding on the efficacy of the new technology approved by the FCC in its *Third Report and Order*.

[12] Even with pre-recorded services, the better analogy is to *cable* television, not broadcasting, because the messages are confined to cable transmission, not sent through the air. And even as compared to cable television, of course, it is far less likely a child will overhear a telephone message or conversation than a television message.

whether the same speech could be subjected to criminal sanctions. 438 U.S. at 750.

(4) Section 223(b) imposes an outright ban on speech covered by the statute. The regulation in *Pacifica* was a mere time-channeling provision. Indeed, the FCC had emphasized that its regulation was "never intended to place an absolute prohibition on the broadcast" of the speech there at issue. 438 U.S. at 532-33. *See also* 438 U.S. at 750; 438 U.S. at 760 (Powell, J., concurring).

(5) Appellant's argument that this case is similar to *Pacifica* because "significantly, adults remain free to purchase recordings containing the identical messages at book or record stores," J.S. at 24, is completely invalid in the context of live services. These interactive, personalized conversations, often with a specific individual requested by the caller, cannot be purchased at a record or book store.[13]

(6) Contrary to Appellant's contention, it cannot reasonably be argued that this case is like *Pacifica* because the speech at issue invades the " 'privacy of the home' " and interferes with " 'the individual's right to be left alone.' " J.S. at 19 (quoting *Pacifica*, 438 U.S. at 748). In *Pacifica*, the Court expressed concern that because "the broadcast audience is constantly tuning in and out" individuals might be confronted with "unexpected program content." 438 U.S. at 748. Live or pre-recorded telephone services, however, do not impinge upon the individual's "right to be left alone" in that or any other sense—calls are initiated by the caller, not the telephone service, and the messages are discrete, not part of a stream of other programming.

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[13] Moreover, the availability of similar speech in a different medium was not and should not be the touchstone of *Pacifica*. The Court's point there was that the *same* speech was available to adults through the *same* medium at a different time of day. Availability of motion pictures at video stores hardly renders motion picture theaters or cable television subject to "indecency" regulation.

(7) The *Pacifica* regulation was supported by FCC fact-finding, while section 223(b) is not: The FCC had expressly determined that the regulatory action at issue in *Pacifica* was a necessary and reasonable means to channel indecent speech " 'to times of day when children most likely would not be exposed to it.' " 438 U.S. at 733 (quoting the FCC). In contrast, the FCC has determined three times that minors can effectively be denied access to live telephone services by methods (*i.e.*, the credit card requirement) far less draconian than section 223(b)'s blanket prohibition.

In short, the factors relied on in *Pacifica* provide no support for upholding a statute that criminalizes constitutionally protected telephone conversations between consenting adults when minors have "virtually no access" to the prohibited speech.

B. Because Section 223(b) Purports To Criminalize "Indecent" Live, Private, Two-Way Conversations Paid For By Credit Card, It Is Substantially Overbroad And Therefore Unconstitutional On Its Face.

For the foregoing reasons, even if the First Amendment did permit criminalization of pre-recorded messages that are not obscene (a proposition which is also strongly at odds with this Court's decisions discussed above), the statute is facially unconstitutional. It is well established that statutes that "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application," and that "[c]riminal statutes must be scrutinized with particular care." *City of Houston v. Hill*, 107 S. Ct. 2502, 2508 (1987). *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). *Cf. Frisby v. Schultz*, 108 S. Ct. at 2504 (White, J., concurring).

It is indisputable that live services engage in a very substantial amount of the speech criminalized by section 223(b)'s "indecency" prohibition. As explained above,

throughout the FCC's "four year experience receiving comments on and drafting and defending regulations," J.S. at 24, the FCC has consistently recognized the substantial volume of calls handled by live services, and established the credit card defense for live services recognizing it was unavailable to pre-recorded services. *See* n.5, *supra; see, e.g., First Report & Order* at 24998. As amended, section 223(b) ignores these differences and explicitly criminalizes "direct[]" as well as recorded communications. 47 U.S.C. § 223(b)(1).

Because no substantial argument can be made that criminal prohibition of indecent speech occurring in live telephone conversations pre-paid by credit card is constitutional, the Government's appeal should be dismissed for want of a substantial federal question. Alternatively, the lower court's ruling on the "indecency" provision—like the similar ruling at issue in *Wilkinson v. Jones*, 107 S.Ct. 1559 (1987)—should be summarily affirmed.

II. IF THE COURT NOTES PROBABLE JURISDICTION, IT SHOULD ALSO EXAMINE WHETHER SECTION 223(b) IN FACT REACHES SABLE'S CONDUCT.

If the Court notes probable jurisdiction of either the Government's appeal or Sable's cross-appeal, it should also examine whether § 223(b) actually reaches Sable's conduct. Section 223(b) imposes criminal and civil penalties only for indecent or obscene calls that are both "interstate" and made for a "commercial purpose." 47 U.S.C. § 223(b). There is a substantial question whether calls initiated from outside California to Sable's pre-recorded message service in California were made for a "commercial purpose." Sable cannot collect any revenue from interstate calls and gains no other business advantage from such calls.[14]

[14] For local "976" calls, Sable receives a portion of the service charge collected by Pacific Bell, the local telephone company. Sable Br. at 5. Pacific Bell, however, does not have billing arrangements with long distance companies that would allow long distance "976"

The FCC has taken the position that an interstate call is made "for commercial purposes" whenever the "messages are transmitted in connection with a business enterprise," whether or not the provider gains any business advantage from the call. *In the Matter of Intercambio, Inc.*, 64 Radio Reg. 2d 1663, 1671 (April 21, 1988) (Sable Br. at J-19). With this expansive reading of the statute, however, the FCC seeks to do what Congress has explicitly chosen not to do, *i.e.* to ban intrastate as well as interstate telephone services.

The Communications Act expressly leaves the regulation of intrastate communications to the States.[15] Because it is presently impossible for Sable to prevent out-of-state callers from calling its intrastate service,[16] the effect of the FCC's expansive reading is to impose § 223(b)'s criminal prohibitions on every telephone service, regardless of whether it is used by an intrastate or interstate caller. Indeed, even if no out-of-state caller actually used the service, the Government could manufacture a violation by placing the interstate call itself—from which Sable would receive no commercial benefit. The result of such a construction would be unavailability

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calls to be billed to the caller. *See* Sable Br. at J-27. The service charge therefore is neither levied nor collected. Moreover, there is no evidence in the record to indicate that Sable reaps a promotional advantage for its intrastate service from the interstate calls.

[15] *See, e.g.*, 47 U.S.C. § 152(b)(1) ("nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier").

[16] At present, Pacific Bell's "976" numbers can be reached from anywhere in North America simply by dialing the area code plus the "976" number. Pacific Bell is apparently now developing an information access service that would be exclusively intrastate, but this service is not yet available. *See Intercambio*, Sable Br. at J-25 n.41. Thus, it is presently technologically *impossible* for Sable to offer its service without being subject to interstate calls.

of the message to intrastate callers. The FCC's construction of the phrase "for commercial purposes" therefore violates congressional intent, evident from the face of the statute, to criminalize only interstate obscene and "indecent" calls.

The FCC's interpretation of "commercial purposes" also violates two well-recognized canons of statutory construction—that criminal statutes be construed narrowly and that statutes be construed, where possible, to avoid implicating First Amendment freedoms.[17] Here, not only did the FCC adopt the broadest possible construction of "commercial purposes," but it did so without considering either the First Amendment or penal implications of its ruling. *See In the Matter of Intercambio, Inc.*, Sable Br. at J-19-20; *In the Matter of Audio Enterprises, Inc.*, 64 Radio Reg. 2d 1681, 1690 (FCC, April 21, 1988).[18]

A more limited construction of "for commercial purposes" is consistent with congressional intent. The prin-

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[17] See, e.g., *Liparota v. United States*, 471 U.S. 419, 427 (1985) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"), quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971); *Frisby v. Schultz*, 108 S.Ct. at 2501 ("statutes will be interpreted to avoid constitutional difficulties"); *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) ("a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind"); *United States v. Batchelder*, 442 U.S. 114, 122 (1979) ("statutes should be construed to avoid constitutional issues").

[18] Because the FCC failed to consider whether § 223(b) should be read more narrowly in light of its criminal sanctions and its effect on the exercise of First Amendment freedoms, the FCC's construction of § 223(b) should not be accorded any deference. An agency's interpretation of an ambiguous statutory term is to be accorded deference only if the agency has made a "reasoned and detailed" consideration of the issue, *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984), including a consideration of "all relevant factors." *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 152 (D.C. Cir. 1984). *See also Motor*

cipal sponsor of § 223(b), Congressman Bliley, said "for commercial purposes" included "activities which may be financially profitable in themselves" as well as "other types of commercial activity" including "advertising or promotional activities for ventures such as magazines or movies." 129 Cong. Rec. H10559 (Nov. 18, 1983).[19] This language does not preclude the conclusion, otherwise supported by the structure of the Communications Act, the literal language of § 223(b) itself, and by canons for construing penal statutes and statutes impinging on First Amendment freedoms, that Congress intended to prohibit only interstate calls made for the purpose of gaining a business advantage.

This Court should decide constitutional questions only when the dispute cannot be resolved on statutory grounds. *Crowell v. Benson*, 285 U.S. 22 (1932). Because there is a substantial question whether § 223(b) reaches Sable's conduct, in the event this Court notes probable jurisdiction, it should ask the parties also to address the statutory interpretation issue.

Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem").

[19] Senator Trible made a similar statement prior to enactment of § 223(b) by the Senate. *See* Remarks of Senator Trible, 129 Cong. Rec. S16867 (Nov. 18, 1983).

CONCLUSION

For the foregoing reasons, the Government's appeal should be dismissed for want of a substantial federal question. If the Court grants plenary consideration to that appeal and/or Sable's cross-appeal, it should supplement the questions presented as suggested in Point II of this brief.

Respectfully submitted,

BRUCE J. ENNIS
(Counsel of Record)
KIT ADELMAN-PIERSON
JOHN T. NAKAHATA
JENNER & BLOCK
21 DuPont Circle, N.W.
Washington, D.C. 20036
Telephone: (202) 223-4400
Attorneys for Amici

Of Counsel:
NEIL I. ADELMAN
RICHARD D. EMERY

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Nos. 88-515 and 88-525

In the Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
CROSS-APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE CROSS-APPELLANTS/APPELLEES

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
RICHARD G. TARANTO
Assistant to the Solicitor General
BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DIANE S. KILLORY
General Counsel
Federal Communications Commission
Washington, D.C. 20554

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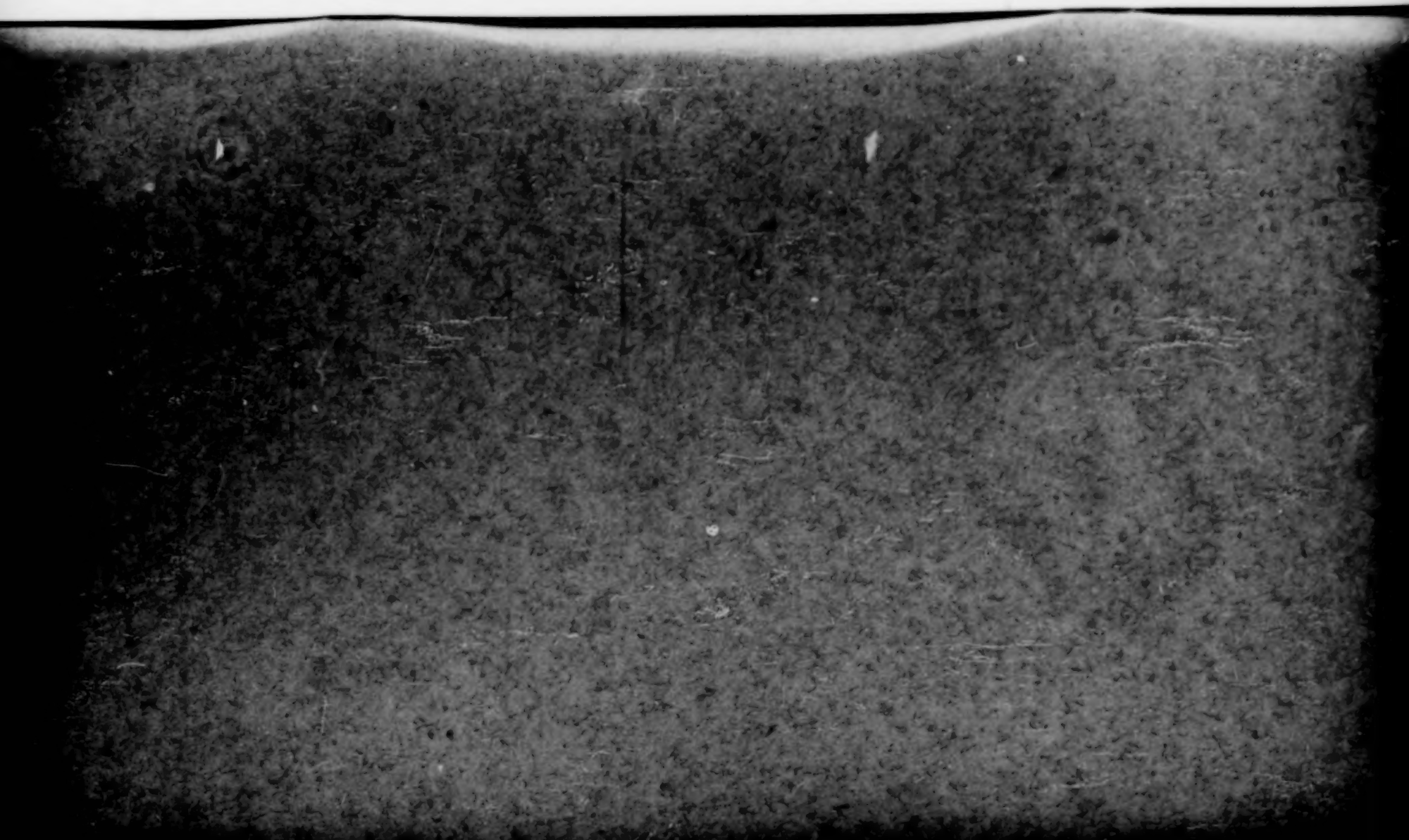

QUESTION PRESENTED

Whether the ban on obscene and indecent interstate commercial telephone messages contained in Section 223(b) of the Communications Act of 1934, as amended (to be codified at 47 U.S.C. 223(b)), is consistent with the First Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-515

SABLE COMMUNICATIONS OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES

No. 88-525

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
CROSS-APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE CROSS-APPELLANTS/APPELLEES

OPINION BELOW

The opinion of the district court (J.S. App. A1-A6)[1] is reported at 692 F. Supp. 1208.

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[1] Unless otherwise indicated, "J.S. App." refers to the appendix to the jurisdictional statement filed by the appellants in No. 88-515.

JURISDICTION

The district court's decision was issued on July 19, 1988. J.S. App. A1. Appellant/cross-appellee Sable Communications of California, Inc. (Sable), filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on July 27, 1988. J.S. App. E1. The government, cross-appellants/appellees here, filed a notice of appeal to this Court from the same decision, but as to different issues, on July 29, 1988. 88-525 J.S. App. 9a-10a. Because of the government's appeal to this Court, Sable's appeal to the court of appeals was dismissed on August 29, 1988. J.S. App. D. Sable's appeal was automatically transferred to this Court under 28 U.S.C. 1252. Sable filed a jurisdictional statement in this Court on September 26, 1988 (No. 88-515), and the government filed a jurisdictional statement on September 27, 1988 (No. 88-525). This Court noted probable jurisdiction in both cases on January 9, 1989. The Court has jurisdiction under 28 U.S.C. 1252.[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law • • • abridging the freedom of speech • • •."

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[2] Section 1252 was repealed by the Act of June 27, 1988, Pub. L. No. 100-352, §1, 102 Stat. 662, effective September 25, 1988 (§7, 102 Stat. 664). The repeal does not affect this case, because it does "not apply to cases pending in the Supreme Court on the effective date • • • or affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." *Ibid.*

Under 28 U.S.C. 1252, this Court has jurisdiction over the government's appeal seeking review of the court's preliminary injunction, because the district court held a federal statute unconstitutional in part. See, *e.g.*, *McLucas* v. *DeChamplain*, 421 U.S. 21, 30 (1975); *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). Section 1252 also provides jurisdiction over Sable's appeal, as a cross-appeal from the same district court judgment.

Section 223(b) of the Communications Act of 1934, as amended by Section 7524 of the Child Protection and Obscenity Enforcement Act of 1988 (enacted as Title VII, Subtitle N of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4485), to be codified at 47 U.S.C. 223(b), provides:

> (b)(1)(A) Whoever knowingly—
>
> > (i) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
> >
> > (ii) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i);
>
> shall be fined in accordance with title 18 of the United States Code, or imprisoned not more than two years, or both.
>
> (2) Whoever knowingly—
>
> > (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
> >
> > (B) permits any telephone facility under such person's control to be used for an activity prohibited by clause (i),
>
> shall be fined not more than $50,000 or imprisoned not more than six months, or both.

Prior to its most recent amendment, Section 223(b), as amended by Section 6101 of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School

Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 424, provided:

> (1) Whoever knowingly—
>
> (A) in the District of Columbia or in interstate or foreign communication, by means of telephone makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for any activity prohibited by subparagraph (A),
>
> shall be fined not more than $50,000 or imprisoned not more than six months, or both.
>
> (2) In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (3)(A) In addition to the penalties under paragraphs (1) and (2), whoever in the District of Columbia or in interstate or foreign communication, violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (B) A fine under this paragraph may be assessed either—
>
> (i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purposes, or
>
> (ii) by the Commission after appropriate administrative proceedings.

(4) The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure.

STATEMENT

In early 1988, Congress amended Section 223(b) of the Communications Act of 1934, 47 U.S.C. (Supp. III) 223(b), to prohibit any person from making any obscene or indecent interstate telephone communication for commercial purposes. Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §6101, 102 Stat. 424. In late 1988, Congress modified certain aspects of the provision but left the prohibitions intact. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, §7524, 102 Stat. 4502. After the first enactment but prior to the second, appellant/cross-appellee Sable, a company that sells so-called "dial-a-porn" telephone services, brought a constitutional action challenging the new prohibitions contained in Section 223(b), chiefly under the First Amendment. The district court denied Sable's request for a preliminary injunction against enforcement of the statute insofar as it applies to obscene interstate commercial telephone messages. J.S. App. A4-A5. The court issued the requested preliminary injunction, however, against enforcement of the statute insofar as it applies to indecent interstate commercial telephone messages, finding the ban on such communications overbroad. *Id.* at A3, A6.

1. The current version of Section 223(b) is the culmination of recent congressional efforts to protect children against so-called "dial-a-porn"—that is, sexually explicit or suggestive messages, typically prerecorded, that are provided for a fee over the telephone. See 134 Cong. Rec. S4377 (daily ed. Apr. 20, 1988). A provider of dial-a-porn

messages arranges with a telephone company to use special telephone lines, frequently though not always with a "976" prefix (or exchange), that are designed to handle large numbers of calls simultaneously. See *Carlin Communications, Inc.* v. *FCC*, 787 F.2d 846, 850-851 (2d Cir. 1986) (*Carlin II*). The telephone company typically charges callers according to prescribed tariffs, retains a portion of the charges, and remits the remainder to the dial-a-porn company. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, Third Report and Order, 2 F.C.C. Rcd 2714, 2715 (1987) (*Third Report*).[3]

Recorded dial-a-porn messages contain a wide range of explicit descriptions of sexual acts. The record in these cases in this Court, for example, shows that callers to the service provided by Sable's affiliate could hear recorded messages describing in graphic detail a woman having sex with a dog, a female "sex therapist" teaching her "special methods" to a young girl, and "master-slave" sex with whips and chains. See Gov't Memo. In Opp. to App. for Inj. Pending Appeal, No. A-143, Exh. A. The purveyors of dial-a-porn can and often do change their messages at least once a day.

The dial-a-porn companies aggressively market their services, and they have been extremely successful. See *Carlin Communications, Inc.* v. *FCC*, 749 F.2d 113, 114 (2d Cir. 1984) (*Carlin I*) (on the New York Telephone system alone, "800,000 calls per day were made to dial-a-porn in May, 1983; 180,000,000 calls in the year ending February, 1984");

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[3] Other dial-a-porn companies, unlike Sable, provide live, "two-way" sex conversations with persons calling a specified number and providing a credit card number for payment. See *Third Report*, 2 F.C.C. Rcd at 2715. That form of dial-a-porn service is specifically at issue in *Roe* v. *Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988) (granting preliminary injunction against Section 223(b)'s prohibition of indecent speech, but refusing preliminary injunction against section's prohibition of obscene speech). That form of service is not at issue in the present cases, as Sable's complaint here alleges only that Sable sells prerecorded messages. J.S. App. F2-F3.

Note, *Children and the Recorded-Message Industry: The Need for a New Doctrine*, 72 Va. L. Rev. 1325, 1328 (1986) (*Recorded Message Industry*) (of 27,000,000 recorded message calls on Pacific Bell in 1984, 12,000,000 went to adult entertainment messages). Because of the aggressive marketing, which includes leaving fliers on cars and distributing them throughout neighborhoods, young children are easily able to obtain the telephone numbers, and they make a substantial portion of all dial-a-porn calls. See 134 Cong. Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats); *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 18 (1987) (*1987 Hearing*) (statement of Rep. Coats).

2. a. Congress made its first attempt to prevent children from gaining access to dial-a-porn in 1983, just after the dial-a-porn industry was launched. In a measure sponsored by Representative Bliley (see *Carlin I*, 749 F.2d at 115-116), Congress added a new subsection (b) to Section 223 of the Communications Act of 1934, 47 U.S.C. 223(b) (Supp. IV 1986). Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, §8(a), 97 Stat. 1469. The provision prohibited any person from using telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen years of age or to any other person without that person's consent." 47 U.S.C. 223(b)(1) (Supp. IV 1986).[4] The enactment provided, however, that it would be a defense to prosecution that the defendant restricted access to adults "in accordance with procedures which the [Federal Communications] Commission shall prescribe by regulation." 47 U.S.C. 223(b)(2) (Supp. IV 1986).

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[4] The 1983 statute and the more recent amended versions all apply "in the District of Columbia or in interstate or foreign communication." To simplify, we refer only to interstate communications.

The statute provided for criminal and civil penalties, including daily fines and up to six months' imprisonment for each violation. 47 U.S.C. 223(b)(1), (3), and (4) (Supp. IV 1986). It also authorized the Federal Communications Commission (FCC or Commission) to initiate judicial or administrative proceedings to assess civil fines. It further authorized the Attorney General to bring suit to enjoin violations. 47 U.S.C. 223(b)(4) and (5) (Supp. IV 1986).

b. Over the next four years, the FCC sought to devise regulations to define the safe-harbor defense to prosecution that was authorized by the statute. The first set of regulations would have established a defense for those dial-a-porn purveyors that operated only between the hours of 9:00 p.m. and 8:00 a.m. Eastern Time or that required payment by credit card before transmission of the message. See *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, Report and Order, 49 Fed. Reg. 24,996 (1984) (*First Report*). Explaining how the regulations sought to protect children from dial-a-porn, the Commission stated its belief that, during the specified night-time hours, "a majority of parents would be available to supervise the actions of their children" (*id.* at 25,001) and that "credit cards are not routinely issued to minors without parental authorization" (*id.* at 25,000).

In *Carlin I*, *supra*, the Second Circuit set aside the regulations and remanded them to the Commission. Although the court recognized that the government's "interest in protecting minors from salacious matter is no doubt quite compelling" (749 F.2d at 121), it concluded that the operating-hours requirement was "both overinclusive and underinclusive" (*ibid.*). It explained that the regulation "denie[d] access to adults between certain hours, but not to youths who can easily pick up a private or public telephone and call dial-a-porn during the remaining hours." *Ibid.* It also found no adequate explanation "why a prohibition on dial-it services is needed during daytime school hours when children

are for the greater part of the year likely to be in class under adult supervision, while the prohibition is not needed after 9:00 p.m. Eastern Time (6:00 p.m. on the West Coast), when a young person needs to be unsupervised for only about ninety seconds in order to dial the number and hear the message." *Ibid.* The court further found that the record did not adequately explain the Commission's rejection of alternative methods of restricting access, such as "screening or blocking or using access numbers" *Id.* at 122.

c. On remand, the Commission promulgated new regulations. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials,* Second Report and Order, 50 Fed. Reg. 42,699, 42,701 (1985) (*Second Report*). The new regulations continued to permit prior credit card payment as a defense to prosecution. They abandoned time restrictions, however, and added instead a defense based on use of access codes, which the Commission found to be both feasible and the least burdensome means of implementing the regulatory mandate. *Id.* at 42,705. The regulations required that access codes be made available only by mail, explaining that this requirement sought to prevent children from obtaining the codes. *Id.* at 42,705 & n.38.

In accordance with the remand order, the Commission examined the options of blocking or screening telephone numbers at the customer's premises or at the telephone company offices; but it rejected those alternatives. 50 Fed. Reg. 42,702-42,706. The Commission concluded that so-called "exchange blocking," which blocks all numbers with a specified exchange (*e.g.*, "976"), would impose substantial costs on many telephone companies and would require new equipment, software, and other measures. *Id.* at 42,702. Such blocking would also block *all* "dial-it" services using the exchange, including weather and sports information (*ibid.*); at the same time, dial-a-porn services could avoid the restriction by offering their services on unblocked exchanges

(*e.g.*, other than "976") (*id.* at 42,702-42,703). As for full "line number" (seven digit) blocking, the technology for doing so was experimental, not yet universally available, and expensive; and it could not "handle the large number of 'dial-a-porn' systems currently in operation." *Id.* at 42,703. Furthermore, the Commission pointed out, "minors need only seek unsupervised telephones in residences where customers do not subscribe to the screening services to gain access to the messages." *Ibid.*[5]

The Commission was aware of the imperfections in its credit card and access code regulations. It recognized that "[n]o method guarantees that some enterprising minors will never hear the messages" and that dial-a-porn access codes and credit cards might be obtained and used by some children. 50 Fed. Reg. at 42,706 n.54. Indeed, recognizing that children were likely to obtain access codes, the Commission required dial-a-porn providers to implement plans for cancelling access codes upon notification that they had been misused (by, for example, being used by a minor). *Id.* at 42,705. Overall, the Commission concluded that its new regulations provided the "most effective method currently available to restrict access by minors without unduly impairing adults who want to hear the messages." *Id.* at 42,706 n.54.

In *Carlin II*, *supra*, the Second Circuit upheld the Commission's rejection of blocking at the telephone company offices (787 F.2d at 853), but it remanded the new regulations on other grounds. Limiting its remand decision to New York Telephone lines, the court concluded that the record did not support the FCC's ruling that access codes were the least restrictive means to regulate dial-a-porn. *Id.*

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[5] The Commission rejected other options on similar grounds—*e.g.*, that they were not technologically and economically feasible, or that they were overbroad and unreasonably intrusive on adults' access (as in the case of scrambling devices). *E.g.*, 50 Fed. Reg. at 42,704. See page 11, *infra* (describing subsequent Commission decision regarding scrambling).

at 848, 855. The court explained that the access code requirement in fact presented substantial problems of feasibility for the New York network. *Id.* at 855. It further reasoned that the Commission had not adequately considered the feasibility of using blocking equipment at the customer's premises with the costs to be borne by the dial-a-porn providers or the telephone companies. *Id.* at 855-856.

d. In response, the FCC promulgated a third version of the regulations. *Third Report, supra.* The FCC found that, since the time *Carlin II* was decided, New York Telephone had developed a means of permitting its customers to use access codes. The new regulations therefore reinstituted the access code defense in the New York area. 2 F.C.C. Rcd at 2720. The new regulations also added on a nationwide basis a new defense of message scrambling to the already proposed defenses of credit card payment and access code use.

The Commission again rejected the use of blocking devices at the customers' premises, not only because they were too expensive, but because they were ineffective in preventing children from gaining access to dial-a-porn, given the ease of disabling the devices and the ready access to dial-a-porn through the great majority of telephones that would not have blocking devices attached. 2 F.C.C. Rcd at 2719-2720. By contrast, the Commission found that scrambling, which it had previously rejected (see note 5, *supra*), would not be burdensome for the message provider and would make dial-a-porn accessible only through telephones with descramblers, which themselves were not expensive. Having reconsidered the matter, the Commission concluded that scrambling would be effective in reducing access to dial-a-porn by minors and could be implemented at reasonable cost. *Id.* at 2720-2721. The Commission noted, however, that "absolute impossibility of access to [dial-a-porn] services * * * is not feasible." *Id.* at 2724 n.14. Moreover, the Commission acknowledged that scrambling "will not achieve the highest effectiveness unless sale of descramblers

to minors is prohibited," and it therefore urged "states to exercise their authority to prohibit sale of descramblers to minors" and "[r]etailers * * * to play a responsible role concerning [such] sale[s]." *Id.* at 2722.[6]

In *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546 (2d Cir. 1988) (*Carlin III*), cert. denied, No. 88-37 (Oct. 31, 1988), the court of appeals upheld the new regulations under the 1983 version of Section 223(b). The court concluded that they were a "feasible and effective way to serve" the "compelling state interest" in "protect[ing] minors from obscene speech" (837 F.2d at 555), although the court directed the FCC to reopen its proceedings if a less restrictive technology becomes available (*id.* at 556). The court ruled, however, that the statute itself would be unconstitutional insofar as it could be construed to restrict speech that is merely indecent rather than obscene, although the court suggested that the statute need not be so construed. *Id.* at 558-561. The court explained that the statute's "use of 'indecent' was clearly made with *FCC v. Pacifica Foundation*, 438 U.S. 726 * * * (1978), in mind." 837 F.2d at 558, citing 129 Cong. Rec. H10,559, H10,560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley). The court concluded, however, that "the *Pacifica* decision does not justify the regulation of indecent telephone messages" as opposed to broadcasting messages. 837 F.2d at 560.

3. While the FCC's regulations were under review in the Second Circuit, Congress revisited the dial-a-porn issue in light of the Commission's experience in attempting to implement the 1983 version of Section 223(b). Congress held hearings on the issues raised by dial-a-porn regulation, with a "very significant focus" on the "technological regulatory

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[6] The Commission also required that, in order for a provider who sells messages through AT & T 900 service to obtain a defense to prosecution, it must ask AT & T that its service be subject to "billing notification"—*i.e.*, an itemization on telephone bills that specifies which particular calls were made to adult message services. 2 F.C.C. Rcd at 2722.

alternatives proposed by the FCC and others." *1987 Hearing* 2 (opening statement of Rep. Markey). See *Cable-Porn and Dial-A-Porn Control Act: Hearing on S. 1090 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1986). Legislators heard testimony that there were significant "engineering problems" associated with screening out calls from minors and that those problems would be eliminated by an across-the-board ban of dial-a-porn. *1987 Hearing* 62 (statement of Robert Helgesen, NYNEX Corp.); *id.* at 116 (Helgesen testimony that central office blocking of dial-a-porn services would cost approximately $35,000,000 for N.Y. Telephone alone). In addition, even opponents of a dial-a-porn ban conceded that the attempts to restrict children's access to dial-a-porn had "proven ineffective so far" and were "going to be ineffective in the future." *Id.* at 118 (testimony of Barry Lynn, ACLU).

In the end, Congress concluded that there was no sufficiently effective technological method of eliminating the access of children to dial-a-porn short of an outright ban. In the words of Representative Bliley, who had sponsored the original enactment of Section 223(b), it had become "clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material. We looked for effective alternatives to a ban—there were none." 134 Cong. Rec. H1691 (daily ed. Apr. 19, 1988). See also *id.* at H1699 (statement of Rep. Coats) ("it is not technologically possible to keep this information out of the hands of young people"); *id.* at H1690 (statement of Rep. Hall) ("the current regulations adopted by the FCC are not effective in stopping the spread of dial-a-porn to minors"); *id.* at S4377 (daily ed. Apr. 20, 1988) (statement of Sen. Hatch) ("If a so-called technological solution to the access of our children to dial-a-porn had been available, I, of course, would have supported it.").

Accordingly, after discussing the practical and constitutional questions relevant to a prohibition of indecent and obscene commercial interstate telephone messages (see, *e.g.*, 133 Cong. Rec. S16,794-S16,800 (daily ed. Dec. 1, 1987); 134 Cong. Rec. H1690-H1703, H1806-H1836 (daily ed. Apr. 19, 1988)), Congress voted to broaden Section 223(b)'s reach beyond telephone communications with minors and to eliminate the provision that permitted a defense to prosecution based on FCC regulations. Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §6101, 102 Stat. 424.[7] As amended, Section 223(b) prohibited the making of "any obscene or indecent communication * * * by means of telephone * * * for commercial purposes * * * in the District of Columbia or in interstate or foreign communication." The subsections providing for criminal and civil penalties and for injunctive relief were not changed from the 1983 version.

4. Sable, a California-based dial-a-porn company affiliated with Carlin Communications, Inc., began offering "frankly sexual" telephone messages through the Pacific Bell telephone network in 1983. 88-515 J.S. 4-5. Before the Hawkins-Stafford Act amendments to Section 223(b) were to take effect on July 1, 1988, Sable brought this suit in the United States District Court for the Central District of California, seeking declaratory and injunctive relief chiefly

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[7] The Senate passed the dial-a-porn prohibition by a vote of 98-0 (133 Cong. Rec. S16,800 (daily ed. Dec. 1, 1987) as an amendment to the larger Hawkins-Stafford education bill, H.R. 5, 100th Cong., 1st Sess. (1987)). See 133 Cong. Rec. S17,048 (daily ed. Dec. 2, 1987) (§7003). The Senate subsequently agreed to the conference report on H.R. 5 as amended to contain the identical dial-a-porn prohibition. 134 Cong. Rec. S4386 (daily ed. Apr. 20, 1988). The House approved H.R. 4401, 100th Cong., 2d Sess. (1988), which was identical to the Senate amendment to H.R. 5, by a vote of 380-22. 134 Cong. Rec. H1702-H1703 (daily ed. Apr. 19, 1988). It then agreed to the conference report on H.R. 5 as amended to contain the provision. *Id.* at H1836.

on the ground that Section 223(b)'s restrictions on obscene and indecent speech violated the First Amendment. On Sable's motion for a preliminary injunction, the district court partly agreed and partly disagreed with the contention that Section 223(b) is unconstitutional. J.S. App. A1-A5.[8]

In declining to enjoin the enforcement of Section 223(b) as applied to obscene telephone messages (J.S. App. A4-A5), the court observed that "obscene speech is unprotected by the First Amendment" (*id.* at A4). Sable argued nonetheless that Section 223(b)'s prohibition of obscene interstate commercial telephone communications is invalid under this Court's ruling in *Miller* v. *California*, 413 U.S. 15 (1973), because, Sable contended, the statute created a national, rather than local, standard of obscenity. The district court rejected the argument. Borrowing from the Second Circuit's ruling with respect to the 1983 version of Section 223(b), the court found that the Hawkins-Stafford version did "'not create an impermissible national obscenity standard any more than do the federal laws prohibiting the mailing of obscene materials, or the broadcasting of obscene messages.'" J.S. App. A4 (quoting *Carlin III*, 837 F.2d at 561).

On the other hand, the district court issued a preliminary injunction against the enforcement of Section 223(b) as applied to indecent speech. J.S. App. A3; 88-525 J.S. App. 7a-8a. The court held that Section 223(b)'s "flat-out ban of indecent speech is contrary to the First Amendment." J.S. App. A3. In a brief discussion, the court concluded that, "insofar as it applies to 'indecent' communications,"

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[8] Sable also challenged Section 223(b) as vague in violation of the Fourteenth Amendment. (Presumably, Sable meant to invoke the Fifth Amendment.) The district court did not separately address the vagueness argument. It simply read the statute as incorporating the definition of "obscene" set forth in *Miller* v. *California*, 413 U.S. 15 (1973), and as using the term "indecent" as the term was used in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978).

Section 223(b)'s prohibition is "overbroad and unconstitutional." J.S. App. A3. The court reasoned that, although "the government unquestionably has a legitimate interest in, *e.g.*, protecting children from exposure to indecent dial-a-porn messages, §223(b) is not narrowly drawn to achieve any such purpose." *Id.* at A3. Explaining its view that "[w]hat is at issue is the breadth to be given to *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978)," the court concluded that *Pacifica* should be read narrowly so as not to reach outside the broadcasting context to Section 223(b). J.S. App. A3.

5. On July 27, 1988, Sable filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit from the adverse ruling regarding obscene speech and sought an injunction pending appeal. J.S. App. E. The appeal was dismissed and automatically transferred to this Court when the government, on July 29, filed an appeal to this Court from the district court's ruling that Section 223(b)'s ban on indecent messages is unconstitutional. See J.S. App. C. Sable's application for an injunction pending appeal was denied by Justice O'Connor on August 30, 1988. *Sable Communications of California, Inc.* v. *FCC*, No. A-143.

On November 18, 1988, the President signed the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181. Section 7524 of the Act substituted a revised Section 223(b) for the Hawkins-Stafford Act version that was before the district court. The new statute does not alter the prohibitions contained in the Hawkins-Stafford version.[9]

The new enactment made several changes in Section 223(b). The current version continues the criminal penalties for indecent interstate commercial telephone communications, but it increases the penalties for obscene messages, providing (102 Stat. 4502) for prison terms of up

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[9] Accordingly, these cases are not moot, and the issues presented by the district court's ruling have not changed so as to warrant a remand for further proceedings by the district court prior to this Court's consideration of the constitutional issues.

to two years and fines "in accordance with Title 18" (that is, up to $250,000 for individuals and up to $500,000 for organizations). See Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, §6, 101 Stat. 1280 (to be codified at 18 U.S.C. 3571(b)(3), (c)(3)). It also places the prohibition against obscene commercial telephone messages in a subsection ((b)(1)) separate from that containing the prohibition against indecent messages ((b)(2)). 102 Stat. 4502. In addition, the new law omits both former Section 223(b)(3), which specified that the FCC could enforce Section 223(b) through appropriate administrative proceedings and civil enforcement actions, and former Section 223(b)(4), which granted the Attorney General the power to seek injunctive relief against dial-a-porn activities. 102 Stat. 4502; see 134 Cong. Rec. E3753 (daily ed. Nov. 10, 1988) (remarks of Rep. Hughes).[10] Section 223(b) itself now contains only criminal penalties for violations of the prohibition of obscene and indecent dial-a-porn.[11]

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[10] Notwithstanding the remarks of Rep. Hughes, the elimination of the non-criminal enforcement provisions of Section 223(b) may have been inadvertent. The government is considering proposing reenactment of those provisions as part of a bill to make technical corrections in the Anti-Drug Abuse Act.

[11] The FCC has general authority to assess a civil forfeiture for any willful or repeated violation of the Communications Act—up to $2,000 for each violation, subject to a prescribed $5,000 ceiling. 47 U.S.C. 503(b)(1) and (2). If assessed without a formal hearing, the penalty would have to be enforced through a civil suit, in which the trial would be de novo. 47 U.S.C. 504(a). In the alternative, the Commission may proceed by way of a hearing before the Commission or an administrative law judge in accordance with the Administrative Procedure Act, 5 U.S.C. 554. In that event, review of the Commission decision would be in a court of appeals pursuant to 47 U.S.C. 402(a) and 28 U.S.C. 2342. To date the Commission has not used the latter procedure in enforcing Section 223(b).

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases involve the validity of Section 223(b)'s ban on both obscene and indecent commercial interstate telephone communications. In none of the versions of Section 223(b) has Congress expressly provided definitions of the terms "obscene" and "indecent." The legislative history of the 1983 and 1988 enactments makes clear, however, that Congress understood the terms as they were used in the decisions of this Court in *Miller* v. *California*, *supra*, and *Pacifica*. 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (statement of Rep. Bliley); *id.* at E5966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier); 133 Cong. Rec. S16,796-S16,799 (daily ed. Dec. 1, 1987) (memorandum of law); 134 Cong. Rec. S4378-S4381 (daily ed. Apr. 20, 1988) (same); *id.* at H1691-H1695 (daily ed. Apr. 19, 1988) (memorandum of law); see *Carlin III*, 837 F.2d at 558.

Under the *Miller* Court's interpretation of the First Amendment, obscene speech "must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). See *Pope* v. *Illinois*, 481 U.S. 497 (1987); *Miller*, 413 U.S. at 24. It is that familiar definition of "obscenity," with patent offensiveness and prurient appeal judged according to "contemporary community standards" (*Miller*, 413 U.S. at 24), that is incorporated in Section 223(b). "Indecent speech" is a broader category, not restricted by the requirements that the speech, taken as a whole, appeal to prurient interest and have no serious literary, artistic, political, or scientific value. Thus, language is indecent within the meaning of Section 223(b) if it "'describes, in terms patently offensive as measured by contemporary community standards for the * * * medium, sexual or excretory activities and organs.'" *Pacifica*, 438 U.S. at 732 (quoting FCC definition). See *id.* at 739-741;

id. at 743 (opinion of Stevens, J.) ("patently offensive references to excretory and sexual organs and activities" (footnote omitted)).[12]

1. In the ruling at issue in No. 88-525, the district court struck down under the First Amendment Section 223(b)'s prohibition of indecent commercial interstate telephone communications. The court so ruled because it found inapplicable this Court's analysis in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), which upheld the Commission's prohibition of the broadcast of indecent material on daytime radio, relying principally on the measure's aim of protecting children against such material. This Court should reverse the district court's ruling. Applying the analysis of *Pacifica* to the telephone context, and carefully examining the special problems presented by the medium before it, as *Pacifica* itself did for broadcasting (*id.* at 748-751), the Court should uphold Section 223(b)'s prohibition of indecent dial-a-porn.

Like *Pacifica*, this case involves a federal effort to prevent children from being exposed to indecent speech through a particular interstate communications technology that presents special dangers of such exposure. Congress has a compelling interest in taking effective measures to protect children from the harmful effects of indecent as well as obscene speech when that speech is readily accessible to children in the home through telephones. After extensive consideration

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[12] The Commission in *Pacifica* described its concept of indecent speech as meaning language that "'describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'" 438 U.S. at 732. For analytic purposes, the time of day qualification is best viewed not as part of the definition of indecent speech but as a factor in the analysis of the validity of the restriction. See *id.* at 740 & nn.14, 15.

In upholding the Commission's proscription of a particular broadcast as indecent, the *Pacifica* Court implicitly rejected a vagueness challenge to the term "indecent" as based on patent offensiveness. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338-1339 (D.C. Cir. 1988).

illuminated by the FCC's experience in this area, Congress determined that there is no technological solution that can ensure that children would not gain access to such telephone pornography. That determination, together with the fact that adults may obtain indecent recorded messages by other means that do not pose the same danger of children's access, is sufficient to sustain Section 223(b)'s ban on obscene and indecent commercial interstate telephone communications against Sable's facial challenge.

2. In the ruling at issue in No. 88-515, the district court held that Section 223(b)'s prohibition against obscene interstate commercial telephone messages is constitutional. That ruling is manifestly correct. It is well established that obscenity is outside the protection of the First Amendment. See, *e.g.*, *Roth* v. *United States*, 354 U.S. 476, 484 (1957).[13] And contrary to Sable's argument, Section 223(b) is not subject to facial challenge on the ground that it unconstitutionally incorporates national (as opposed to local) standards for obscenity and therefore actually proscribes speech that may not constitutionally be proscribed as obscene.

Section 223(b) does not contravene the "contemporary community standards" requirement of *Miller* v. *California*, 413 U.S. 15 (1973). Neither *Miller* nor any other decision of this Court states whether, in an inherently national technological medium like the interstate telephone network, obscenity may be defined according to broader than local standards. Of course, Sable's challenge is meritless if national standards of some kind are constitutionally appropriate. But the question whether national or local standards are permissible in this setting need not and should not be

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[13] Although much (perhaps most) of the speech on dial-a-porn may be obscene under the *Miller* standard (see *Carlin Communications, Inc.* v. *South Central Bell Tel. Co.*, 461 So.2d 1208, 1215-1216 (La. App. 1984)), it has not been disputed in this case that Sable also sells indecent speech, or would do so if permitted (especially if prohibited from selling obscene speech).

answered in Sable's facial challenge here. As we have noted, Section 223(b) incorporates whatever standards *Miller* and the Constitution require. It is a sufficient answer to Sable's facial challenge that Section 223(b), in future applications, will be construed according to the requirements of the First Amendment.

Moreover, if the Constitution requires obscenity to be defined according to local community standards, enforcement of Section 223(b) can fully accommodate the need to apply such standards. Criminal prosecutions under Section 223(b) would be tried in local district courts, typically to local jurors, who would draw on the knowledge of their own community in applying the *Miller* standards. *Hamling* v. *United States*, 418 U.S. 87, 105 (1974). And the Commission's administrative forfeitures, which are now far less significant than the available criminal penalties, are ordinarily to be enforced through a de novo trial in a local district court. See 47 U.S.C. 504(a). Both enforcement mechanisms involve a local decisionmaker who is well situated to apply local standards. In any event, an as-applied challenge is the proper means for alleging deficiencies in the application of Section 223(b), including any alleged deficiencies in the guidance Section 223(b) gives to the Commission.

Section 223(b)'s ban on obscene communications is not facially invalid on the ground that dial-a-porn providers like Sable may feel compelled to tailor their messages to the least tolerant community. Of course, the application of a standard based on broader than local communities would not cause that problem and in that respect would be more favorable to dial-a-porn providers than the application of local standards. But even if local standards must be used in applying Section 223(b), there is no infirmity in the statute, for Sable's tailoring obligation is simply the inevitable consequence of the inherently national character of the telephone network. Those who choose to furnish potentially obscene

messages in communities across the nation must be prepared to comply with the standards of each of those communities.

Finally, even if this Court were to hold Section 223(b)'s ban on indecent interstate commercial telephone messages invalid, the application of Section 223(b) to obscene speech would not be invalid, because the obscenity prohibition is plainly severable. The prohibition of obscenity may be enforced independently of the ban on indecency. Moreover, the language and legislative history of the statue, both before and after its most recent amendment, show clearly that Congress would have intended the ban on obscene dial-a-porn to survive even if the ban on indecent dial-a-porn were struck down. See *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987).

ARGUMENT

I. SECTION 223(B)'S PROHIBITION OF INDECENT COMMERCIAL INTERSTATE TELEPHONE COMMUNICATIONS IS CONSTITUTIONAL ON ITS FACE

The district court erred in striking down Section 223(b)'s indecency prohibition as overbroad and hence facially invalid.[14] As this Court has made clear, facial invalidation

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[14] When Congress was considering the bills that led to the enactment of the first 1988 amendment to Section 223(b), the FCC General Counsel pointed out to Congress that the FCC had "consistently regarded a total ban on the dissemination of indecent, but not obscene, material to be beyond the bounds permitted by *Pacifica*." *1987 Hearing* 246 (letter of FCC General Counsel). See also *id.* at 250. The FCC General Counsel also testified that "there may be serious problems in sustaining the constitutionality" of the indecency portion of what became Section 223(b). *Id.* at 213. In addition, the United States Attorney for the District of Utah informed Congress that he was "of the opinion that an outright ban of indecent dial-a-porn messages would likely be found unconstitutional by the courts." *Id.* at 258.

Those statements—as predictions of likely judicial rulings and an acknowledgement that *Pacifica* does not by its terms cover the telephone ban at issue here, but would require an extension to reach this case—are not necessarily inconsistent with the view that Section 223(b) should be

for overbreadth is "strong medicine" to be used "with hesitation, and then only as a last resort." *New York* v. *Ferber*, 458 U.S. 747, 769 (1982) (internal quotation marks omitted). The potential for some troublesome applications is not enough. A statute can be found overbroad only if it has a "substantial number of impermissible applications." *Id.* at 771. See also *New York State Club Ass'n, Inc.* v. *City of New York*, No. 86-1836 (June 20, 1988), slip op. 8, 11; *Board of Airport Comm'rs* v. *Jews for Jesus, Inc.*, No. 86-104 (June 15, 1987), slip op. 4-5; *Houston* v. *Hill*, No. 86-243 (June 15, 1987), slip op. 6-7; *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973). Section 223(b) passes that test as applied to the dial-a-porn at issue in these cases: the statute permissibly prohibits Sable's explicitly sexual, patently offensive prerecorded commercial interstate telephone messages.[15]

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sustained as enacted. In any event, it is our position in this Court that the constitutionality of Section 223(b) should be upheld based on the determinations that Congress made in enacting it.

[15] For the reasons that follow, Section 223(b) is valid as applied to all indecent speech—patently offensive descriptions of sexual or excretory functions or organs. Because Sable's challenge is a facial one, however, it is important to note that, from all that appears, virtually all of Sable's "frankly sexual" messages not only meet the definition of "indecent speech" incorporated in Section 223(b) but also, taken as a whole, appeal to the prurient interest. Certainly the dial-a-porn services are sold on that basis. There is no reason to believe that *any* of Sable's services, let alone a substantial portion of them, include speech that does not appeal to the prurient interest, such as, perhaps, the George Carlin monologue that was at issue in *Pacifica*. The speculative possibility of such an application of Section 223(b), therefore, is not a ground for invalidating Section 223(b) on its face. Any such application should await an as-applied challenge.

Similarly, that Section 223(b) also applies to live two-way communications (see note 3, *supra*) does not support Sable's facial overbreadth challenge, whatever the validity of Section 223(b) as applied to such communications. First, there is no evidence that two-way communications constitute a "substantial" portion of Section 223(b)'s applications.

No decision of this Court specifies a particular test for First Amendment validity in the circumstances presented here. The Court has stated that "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 540 (1980). But in *Consolidated Edison* and in earlier and subsequent decisions applying that compelling purpose/narrow tailoring test, the speech covered was political speech or, more generally, speech on issues of public concern. See, *e.g.*, *Boos* v. *Barry*, No. 86-803 (Mar. 22, 1988), slip op. 7-8; *Perry Education Ass'n* v. *Perry Local Educators Ass'n*, 460 U.S. 37, 45-46 (1983); *First Nat. Bk.* v. *Bellotti*, 435 U.S. 765, 786 (1978). Moreover, the Court has repeatedly noted the political or public-issue character of speech in explaining why restrictions on such speech are subject to "the most exacting scrutiny" under that standard. *Boos* v. *Barry*, slip op. 7; see, *e.g.*, *Frisby* v. *Schultz*, No. 87-168 (June 27, 1988), slip op. 4 (such speech is at the "core" of the First Amendment); *Hustler Magazine, Inc.* v. *Falwell*, No. 86-1278 (Feb. 24, 1988), slip op. 4 ("heart" of the First Amendment). The patently offensive, explicitly

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In any event, the overbreadth doctrine applies only where protected speech would be deterred by an overbroad restriction, and no such deterrence occurs where persons subject to the restriction can easily distinguish the validly proscribed speech from protected speech. Here, the two-way services are readily identifiable as distinct from prerecorded messages. Therefore, the overbreadth doctrine's concern with deterrence of speech that speakers would find hard to distinguish from proscribable speech has no application in the present context. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 964-965 (1984) (overbreadth analysis asks if the statute applies to an "easily identifiable" category of proscribable speech); L. Tribe, *American Constitutional Law* §12-28, at 1024 (2d ed. 1988) (overbreadth doctrine applies where "deterrence of protected activities is substantial").

sexual speech sold by Sable, of course, is a far cry from speech on issues of public concern.

Plurality opinions in this Court have expressly stated that certain kinds of sexual speech, although not obscene and therefore not wholly outside the protection of the First Amendment, may more readily be restricted than, for example, speech on public issues. The plurality in *Pacifica*, 438 U.S. at 743, stated that patently offensive sexual and excretory speech "surely lie[s] at the periphery of First Amendment concern."[16] Similarly, the plurality in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), distinguished sexually explicit but non-obscene speech from "ideas of social and political significance" (*id.* at 61) and stated of the former (*id.* at 70): "it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." Cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 49 n.2 (1986) (citing and quoting in a parenthetical the passage from *American Mini Theatres* plurality).

The foregoing furnishes authority for application in the present setting of a First Amendment standard less "exacting" (*Boos*, slip op. 7) than the compelling purpose/narrow tailoring standard, or of a less rigid application of that standard, one that gives Congress a comparatively wide berth in making judgments about the social harms caused by indecent commercial speech on the telephone network and the feasibility of less restrictive alternatives. Even under the compelling purpose/narrow tailoring standard, however, Section 223(b) survives Sable's First Amendment challenge. For essentially the same reasons, Section 223(b) is also valid under the approach taken by the majority portion of the lead

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[16] The plurality added (438 U.S. at 743 n.18): "A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."

opinion in *Pacifica*, which, without formulating a particular test for First Amendment validity, directly analyzed the governmental interests being pursued, the distinctive aspects of the medium at issue, the relation of the restriction to the governmental interests, and alternative sources from which adults may obatin indecent speech. 438 U.S. at 748-751. In brief, Section 223(b)'s ban on indecent as well as obscene interstate commercial telephone communications, far from being overbroad, is a "precisely drawn means of serving a compelling state interest" (*Consolidated Edison Co.*, 447 U.S. at 540), because it is the only effective way of protecting all children from the harmful effects of telephone pornography.

A. Congress Has A Compelling Interest In Preventing Children From Obtaining Access To Indecent As Well As Obscene Telephone Pornography

"A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, this Court has long recognized that the government has a "compelling" interest in "'safeguarding the physical and psychological well-being'" of children. *New York* v. *Ferber*, 458 U.S. at 756-757 (citation omitted). As a result, "[t]his Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 684 (1986). See *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 690 (1968) ("because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults"). Thus, the Court has held that bookstores and movie theatres may be prohibited from making indecent, non-obscene material available to children,

Ginsberg v. *New York*, 390 U.S. 629 (1968), and that radio stations may be prohibited from broadcasting indecent, non-obscene material when there is a risk that children are in the audience, *Pacifica*, *supra*. See also *New York* v. *Ferber*, *supra* (persons may be prosecuted for distributing pornographic materials using depictions of sexually explicit conduct by children even though such materials might not be legally obscene).

The Court's decision in *Pacifica*, which upheld the FCC's authority to prohibit the afternoon radio broadcast of a comedy monologue containing indecent speech, is of course centrally important to evaluating the constitutionality of the congressional ban on indecent commercial telephone speech here. The Court there reasoned that "special treatment of indecent broadcasting" is "amply justif[ied]" by the "ease with which children may obtain access to broadcast material," coupled with "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household.'" 438 U.S. at 749-750 (quoting *Ginsberg* v. *New York*, 390 U.S. at 639, 640). The same is true with respect to the telephone medium at issue in the present setting.[17]

Like radio and television, the telephone is a technological means of distributing messages into the home that is "uniquely accessible to children." *Pacifica*, 438 U.S. at 749. The telephone is as much a fixture in modern American homes as radio and television. See Bureau of the Census, *Statistical*

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[17] This Court has stated that "each medium of expression presents special First Amendment problems" (*Pacifica*, 438 U.S. at 748) and that the government's interests in regulating broadcasting do "not readily translate into a justification for regulation of other means of communication" (*Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983)). Those cautions, however, mean only that careful analysis of the particular medium at issue is necessary before the reasoning of *Pacifica* is extended beyond the broadcasting medium. Here, as we shall show, the factors relied on in *Pacifica* fully support the ban on indecent and obscene commercial telephone communications.

Abstract of the United States 1988 523 (108th ed. 1988) (92.5% of households have telephone service; 99% have radios and 87.4% have television). Children are taught to use the telephone at an early age, and even for relatively young children, dialing a telephone is as easy as turning on a radio or television set. Moreover, the aggressive marketing techniques of companies like Sable make dial-a-porn telephone numbers readily available to minors. See 134 Cong. Rec. H1699 (daily ed. Apr. 19, 1988) (statement of Rep. Coats) (dial-a-porn companies "use indiscriminate marketing strategies, place fliers on windshields, indiscriminately flier neighborhoods, and spread the telephone numbers around to anyone without regard to age"); *1987 Hearing* 18 (statement of Rep. Coats). From the perspective of parents trying to maintain "authority in their own household to direct the rearing of their children" (*Ginsberg* v. *New York*, 390 U.S. 639 (noting that such authority is "basic in the structure of our society")), what this Court said of indecent broadcasting in *Pacifica* carries over to indecent telephone speech: it "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748 (citation omitted). See also *Frisby* v. *Schultz*, slip op. at 9-10.

The similarity of dial-a-porn providers and broadcasters is underscored by the fact that telephone sex services are typically designed so that messages can be provided to many callers at the same time. The Second Circuit observed in *Carlin II* (787 F.2d at 850) that, in New York, for example, "over 7,900 callers can be connected simultaneously to the same recorded message and the system as a whole can handle over 400,000 calls per hour." Given that capability, the dial-a-porn provider in effect "broadcasts" its messages, though it uses the telephone system rather than radio and

television frequencies (or cablecasting).[18] Cf. *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1294 (9th Cir. 1987), cert. denied, No. 87-1479 (Apr. 25, 1988).

The problem of access by children is, of course, not obviated by the fact that a caller must voluntarily dial a telephone number in order to receive a dial-a-porn service. Indeed, it was the fact that children might voluntarily dial such services that concerned Congress. Children have a natural curiosity about sex and adult behavior but are "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Ginsberg* v. *New York*, 390 U.S. at 649-650 (Stewart, J., concurring in the result). See *Parham* v. *J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions * * *.") See generally *Thompson* v. *Oklahoma*, No. 86-6169 (June 29, 1988), slip op. 7-8 n.23 (opinion of Stevens, J.). In its practical effect, indecent speech available on the telephone is an insidious form of "attractive nuisance" for children: it is a 24-hour-a-day, 7-day-a-week temptation that is available at the touch of a few buttons (or turns of a dial) at home, at a friend's house, or at any public telephone. See Note, *Recorded Message Industry*, 72 Va. L. Rev. at 1343-1344.

The ability of parents to prevent their children from gaining access to indecent communications is severely limited.

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[18] Indeed, by using the nationwide telephone system, dial-a-porn providers free themselves of the physical constraints that limit the geographical reach of individual broadcast stations. As long as local telephone companies do not all block interstate calls, persons in any part of the country have the ability to call a dial-a-porn provider. One consequence of such nationwide access is that time-of-day restrictions are necessarily of quite limited effectiveness in preventing children from obtaining access to dial-a-porn, because children in one time zone have the ability to call a provider in another.

Monthly bills may provide some information about children's calls, but that information is limited and is received long after the calls have been made.[19] It is almost impossible (without routinely listening in on an extension) for parents to monitor their children's telephone conversations. The difficulty of parental supervision is magnified by the fact that "a young person needs to be unsupervised for only about ninety seconds" in order to hear a dial-a-porn message. *Carlin I*, 749 F.2d at 121. In addition, children can obtain access to such messages from telephones outside the home. As both Congress and the Commission concluded, neither access codes nor scrambling nor any other device so far developed can enable parents to prevent children's access. In these circumstances, government may legitimately step in. See *Ginsberg* v. *New York*, 390 U.S. at 640 ("'While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them.'"); cf. *Schall* v. *Martin*, 467 U.S. 253, 265 (1984) (where "parental control falters, the State must play its part as *parens patriae*").

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[19] A parent's receipt of information in the telephone bill at the end of the month does not enable the parent to prevent or to cure the harm inflicted on children who have listened to sexually explicit messages during the month. See Note, *Recorded Message Industry*, 72 Va. L. Rev. at 1341 n.99 (noting that a young San Francisco caller made enough 976 calls during a single month to fill up 100 pages of his grandfather's telephone bill). Cf. *Pacifica*, 438 U.S. at 748-749 (footnote omitted) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place."). *Pacifica* itself was based on a complaint made by a father who heard the broadcast while driving with his young son. That the father was able to turn the dial did not change the Court's conclusion that the broadcast could be prohibited. See 438 U.S. at 730.

Here, Congress acted based on its finding that the ready availability of graphic sexual messages was having "devastating impacts on children." 134 Cong. Rec. H1713 (daily ed. Apr. 19, 1988) (statement of Rep. Coats). See *id.* at S4377 (Apr. 20, 1988) (statement of Sen. Hatch) (dial-a-porn is a "problem which considerable evidence has shown is detrimental to [the] physical, intellectual, and moral well-being" of children). As Rep. Coats stated, "[r]ecords show that a substantial portion of the calls that are made are made by young children, children of very impressionable ages that hear graphically pornographic material that leaves a vivid impression on them. Experts have testified that such messages can cause drastic changes in behavior in some of those young people." *Id.* at H1699 (daily ed. Apr. 19, 1988).[20]

In short, these cases, like *Pacifica*, involve indecent speech that Congress specifically determined to be harmful to minors. And these cases, like *Pacifica*, involve a technological medium of communication that intrudes into the home and is readily accessible to minors. In these circumstances, it is just as legitimate for Congress to take special measures

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[20] One clinical psychiatrist noted that a child's exposure to dial-a-porn messages may lead to various psychological complications, such as premature sexual arousal, gross misunderstandings of human sexuality, and confusion about sexual values. Because children often view the telephone as an authoritative source of information, they may develop a fascination with what they hear and attempt to imitate adult behavior by acting out sexual messages with other children. Declaration of Dr. Victor B. Cline, ¶3.i, 3.j, attached as Exh. F to Gov't's Opp. to Plaintiff's Motion for Prelim. Inj. Congress was aware of two disturbing incidents involving children and telephone pornography in California alone. In one, a 12-year-old boy admitted having oral sex with a 4-year-old girl after hearing dial-a-porn messages on a church telephone. In the other, two boys (ages 15 and 11) sexually molested a 10-year-old girl after the three listened to dial-a-porn messages and repeated what they had heard to each other. See 133 Cong. Rec. S16,794-S16,795 (daily ed. Dec. 1, 1987) (statement of Sen. Helms); see also 134 Cong. Rec. S4377-S4378 (daily ed. Apr. 20, 1988) (statement of Sen. Helms).

to prevent minors' access to such speech through the particular medium of interstate telephones as it was for the FCC, pursuant to its authority to enforce 18 U.S.C. 1464, to take steps against indecent broadcasting for that purpose in *Pacifica*.

B. Congress Reasonably Determined That An Across-The-Board Ban Is The Only Effective Means Of Preventing Children's Access to Telephone Pornography

Whereas *Pacifica* involved only a daytime broadcasting ban, Section 223(b) bans commercial interstate indecent telephone communications at all hours. Whatever the validity of such a more comprehensive restriction in the broadcasting context,[21] a question that *Pacifica* expressly did not reach (438 U.S. at 750 n.28), the ban is valid in the setting presented in these cases. Congress legitimately concluded that no lesser measure would protect all children from the harmful effects of the availability by telephone of patently offensive sexual messages.

In 1983, Congress had sought to preclude access by children to dial-a-porn by instructing the FCC to devise methods of removing children from the dial-a-porn audience while permitting adults to continue to obtain access to such messages. 47 U.S.C. 223(b)(2) (Supp. IV 1986). In 1988, Congress revisited the issue in light of the FCC's four-year effort to promulgate maximally effective, valid regulations. Although the Commission had adopted regulations pursuant to the legislative mandate (see *Carlin III*, 837 F.2d at 555), Congress came to the conclusion, based on the interests at

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[21] Section 608 of the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, §608, 102 Stat. 2228, requires the FCC to prohibit indecent television broadcasts pursuant to 18 U.S.C. 1464 "on a 24 hour per day basis." That requirement and the FCC's implementing rule are being challenged in *Action for Children's Television* v. *FCC*, No. 88-1916 (D.C. Cir. filed Dec. 30, 1988), stay granted, Jan. 23, 1989.

stake and the state of technology, that access by children to telephone pornography could not adequately be prevented without prohibiting such pornography altogether.

While lesser means might accomplish the task for the sale of adult books and movies, Congress concluded that there is simply no "technological solution" that could sufficiently separate the audience of children from the audience of adults at the point of commercial sale—that there is no feasible way to prohibit indecent commercial telephone messages for one and not the other. 134 Cong. Rec. H1691 (daily ed. Apr. 19, 1988) (statement of Rep. Bliley) ("We looked for effective alternatives to a ban—there were none."). See sources cited at page 13, *supra*. In other words, the dial-a-porn provider, like the broadcaster in *Pacifica*, "cannot reach willing adults without also reaching children." 438 U.S. at 758-759 (Powell, J., concurring in part and concurring in the judgment). And, given the nature of the telephone system, the lesser measures proposed by the FCC in its rulemaking proceedings, effective as they were, could not achieve the valid end of precluding access by minors altogether.[22]

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[22] This remains true even in those few recent instances in which local telephone companies have made the necessary investments, required all dial-a-porn services within their local service areas to be provided on a separate, blocked exchange, and required customers to notify the phone company if they wish the exchange unblocked for their phones. See *Fabulous Assocs., Inc.* v. *Pennsylvania Pub. Utility Comm'n*, 693 F. Supp. 332, 339 (E.D. Pa. 1988) (Bell Tel. Co. of Penna.). In that situation, it is still possible for children to gain access to dial-a-porn services provided locally by using unblocked phones outside their home (see *Second Report*, 50 Fed. Reg. at 42,703) and to gain access to dial-a-porn messages provided elsewhere by using even their own blocked telephones to make interstate calls to dial-a-porn providers located in areas served by phone systems that have not instituted interstate blocking.

The district court acknowledged that the government's interest in protecting children from dial-a-porn is "unquestionably * * * legitimate," but it determined that Section 223(b)'s "flat-out ban of indecent speech" is not "narrowly drawn" to protect that interest. J.S. App. A3. That conclusion is incorrect. Section 223(b) does not ban all indecent speech for adults, and it is not overbroad given the ready access that young children have to telephones and the insufficiency of lesser measures.

Section 223(b) restricts the method by which indecent telephone communications may be distributed, but it does not prohibit the dissemination of indecent messages entirely. Even aside from the "interstate" and "commercial" limitations on Section 223(b)'s reach,[23] it is significant that Section 223(b) is a restriction only on the telephone medium. Adults remain free to purchase recordings containing the identical messages at book or record stores, where access to minors is much more easily restricted. The Court in *Pacifica* found the availability of such alternative sources significant. See 438 U.S. at 750 n.28 ("[a]dults who feel the need may purchase tapes and records * * * to hear these words").

Second, the court's conclusion that the statute is not narrowly drawn is fundamentally inconsistent with Congress's determination, based on the FCC's four-year experience

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[23] There is no doubt that Sable is in the business of providing dial-a-porn messages for a fee to callers from both inside and outside the State of California and, therefore, that Sable makes interstate telephone communications "for commercial purposes" within the meaning of Section 223(b). Because of the particulars of the billing arrangements between Pacific Bell and its long-distance telephone companies, it may be that Sable receives no *direct* revenue from out-of-state calls. But that does not require a contrary conclusion. If nothing else, Sable's interstate business helps to market its intrastate business, and it is thus the kind of "advertising or promotional activit[y]" that was expressly within the contemplation of Congress when it enacted the commercial purposes requirement. See 129 Cong. Rec. H10,559 (daily ed. Nov. 18, 1983) (remarks of Rep. Bliley). Accord *id.* at S16,867 (remarks of Sen. Trible).

receiving comments on and drafting and defending regulations, that children would continue to gain access to pornographic messages as long as commercial enterprises continued aggressively to distribute such messages over the national telephone system—even with FCC regulations requiring the use of access codes, scrambling devices, and credit cards. That congressional determination is entitled to substantial deference. See *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985); *Rostker* v. *Goldberg*, 453 U.S. 57, 83 (1981). It is, moreover, directly supported by the FCC's determinations that "[n]o method guarantees that some enterprising minors will never hear the messages" (*Second Report*, 50 Fed. Reg. at 42,706 n.54) and that "absolute impossibility of access to [dial-a-porn] services * * * is not feasible" (*Third Report*, 2 F.C.C. Rcd at 2724 n.14). The pervasiveness of the access that children have to telephones means that an outright ban *is* the narrowest alternative available to prohibit access to dial-a-porn by all children.

For those reasons, the Court's decision in *Butler* v. *Michigan*, 352 U.S. 380 (1957), does not support the district court's ruling here. Because of the availability of alternative sources of indecent speech, Section 223(b) does not reduce "the adult population" to hearing "only what is fit for children." *Butler* v. *Michigan*, 352 U.S. at 383.[24] Moreover, the law at issue in *Butler* was a sweeping prohibition on the sale of adult books altogether. That prohibition was needlessly overbroad, because less restrictive means were available for separating adults from children at the point of sale—namely, requiring the booksellers to sell only to adults. That is not so in the present setting. Just as "the broadcaster cannot reach willing adults without also reaching children" (*Pacifica*, 438 U.S. at 758-759 (Powell, J., concurring in part and concurring in the judgment)), so too with prerecorded messages on

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[24] The Court in *Pacifica* distinguished *Butler* on the same ground. See 438 U.S. at 750 n.28.

the telephone network. There is no person checking the age of callers before the message is transmitted; and in any event, unlike a bookseller's ability to screen customers (by sight and other means, such as requiring drivers' license identification), the ability to screen customers over the telephone would be seriously limited. In these circumstances, Congress determined that there is no sufficiently reliable way to separate children from adults among the customers.

II. SECTION 223(B)'S BAN ON OBSCENE INTERSTATE COMMERCIAL TELEPHONE MESSAGES IS CONSTITUTIONAL AND SHOULD BE UPHELD

A. Section 223(b)'s Prohibition Of Obscene Commercial Speech Is Consistent With The First Amendment

This Court has repeatedly held that obscene speech is not protected by the First Amendment. See, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. at 497; *Miller* v. *California*, 413 U.S. at 23. As the Court observed in *Roth* v. *United States*, 354 U.S. 476, 485 (1957), punishment of the commercial distribution of such speech has "'never been thought to raise any Constitutional problem'" even as to consenting adults. See *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49 (1973). Accordingly, insofar as Section 223(b) prohibits interstate commercial telephone messages that are obscene, it stifles no speech that is protected by the First Amendment.[25]

Sable nevertheless challenges Section 223(b) on the ground that it unconstitutionally incorporates national, as opposed to local, standards for determining obscenity and that it therefore actually proscribes speech that may not constitutionally be proscribed as obscene. Sable's argument rests on the assertion that, under the First Amendment as

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[25] Indeed, prior to being amended in 1988 to prohibit obscene commercial interstate telephone messages, Section 223(b) stood as the only federal statute that attempted merely to regulate rather than ban the commercial distribution of obscenity. The 1988 amendment brought Section 223(b) into line with other federal obscenity statutes.

construed in *Miller* v. *California*, *supra*, the category of unprotected obscenity must be defined by reference to local community standards. According to Sable, Section 223(b) violates that requirement. 88-515 J.S. 11-16. The district court properly rejected this argument for holding Section 223(b) invalid on its face. J.S. App. A4.

1. The premise of Sable's argument—that the First Amendment requires obscenity to be defined according to local standards—is open to question in the present setting. *Miller* itself referred to "contemporary community standards." 413 U.S. at 24. And, as the Court elaborated in *Hamling* v. *United States*, 418 U.S. at 104-105, *Miller* by its own terms did not intend to require as a constitutional matter the use of any precise geographic area in making an obscenity determination. Moreover, neither *Miller* nor any other obscenity decision of this Court involved an inherently national technological medium like the interstate telephone network. Accordingly, it is an open question whether some kind of national community standard may be used to define obscenity where the speech is, as here, necessarily available simultaneously throughout the nation.[26]

A number of considerations would support the use of broader than local standards, at least in ordinary Commission proceedings. Sable's complaint that it must comply with the standards of the least tolerant communities in the nation would dissolve if obscenity were defined by, for example, an average or prevalent national standard. Moreover, the use of a national community standard would fit

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[26] The Court recently noted in *Fort Wayne Books, Inc.* v. *Indiana*, No. 87-470 (Feb. 21, 1989), slip op. 13, that "'community standards' may vary from jurisdiction to jurisdiction where different predicate obscenity offenses allegedly were committed." That statement by its terms contemplates only that obscenity standards "may vary" in sundry jurisdictions where "different" obscenity offenses are committed in those jurisdictions. *Fort Wayne* did not involve, and the Court had no occasion to address, the question of defining "obscenity" where a single message is distributed simultaneously throughout the nation.

with the inherently national nature of the medium; and as the Commission explained in recent administrative proceedings (J.S. App. J31-J32), such a standard would serve the "community standard" requirement's purpose of ensuring that "material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Hamling* v. *United States*, 418 U.S. at 107. Furthermore, as the Commission also explained, at least in administrative enforcement proceedings where there is no formal hearing in which evidence of local standards is taken, the Commission's "ability to apply a standard based on a community outside of Washington, D.C., would appear to be somewhat limited." J.S. App. J33. See also 129 Cong. Rec. H10,560 (daily ed. Nov. 18, 1983) (remarks of Rep. Bliley) ("The Commission should exercise care that it does not misrepresent Supreme Court cases by inserting local before community standards.").

2. This Court, however, need not and should not resolve in these cases whether Section 223(b) does or may constitutionally incorporate broader than local standards for determining obscenity. As we have explained (see page 18, *supra*), while Section 223(b) itself does not define the term "obscenity," the legislative history makes clear that Congress intended the term to be interpreted to incorporate the standards required by the First Amendment as construed in *Miller*. See, *e.g.*, 134 Cong. Rec. S13,427 (daily ed. Sept. 28, 1988) (remarks of Sen. Biden); 134 Cong. Rec. E1111 (daily ed. Apr. 19, 1988) (statement of Rep. Dannemeyer); 129 Cong. Rec. E5966 (daily ed. Dec. 14, 1983) (statement of Rep. Kastenmeier); *id.* at H10,560 (daily ed. Nov 18, 1983) (statement of Rep. Bliley). Hence, even if the First Amendment calls for the use of local standards for determining obscenity, Section 223(b) is not facially invalid, because in future applications it can and must be construed to incorporate obscenity standards consistent with the First Amendment.

An important prudential consideration further counsels against this Court's reaching the question of obscenity standards under Section 223(b) in the present facial challenge. The government has not yet made any attempt to enforce any sanctions under Section 223(b) using national standards.[27] In light of the traditional reluctance of this Court to decide constitutional issues outside of a concrete factual setting, it would be inappropriate to determine the validity of using national standards in applying Section 223(b) before the Commission and lower courts have even tried to formulate and apply such standards. See, *e.g.*; *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588 (1972); *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569 (1947).[28]

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[27] The Commission initiated two administrative proceedings to impose fines against two dial-a-porn companies (which are not affiliated with Sable) for violating the 1983 version of Section 223(b). See *In the Matter of Intercambio, Inc.*, 64 Radio Reg. 2d(P&F) 1663 (Apr. 21, 1988) (reprinted at J.S. App. J); *In the Matter of Audio Enterprises, Inc.*, 64 Radio Reg. 2d(P&F), 1681 (Apr. 21, 1988) (see J.S. App. K). Neither proceeding involved a formal hearing, and the Commission stated in *Intercambio* that, in that circumstance, it would not apply the obscenity standards of any particular local community, but instead would apply a broader standard. J.S. App. J32-J33. But enforcement of the penalty in court would take place in a local district court, which, under 47 U.S.C. 504(a), would provide a de novo trial applying local standards if *Miller* so required. In any event, the Commission noted in *Intercambio* that the messages at issue were "patently offensive and * * * [went] well beyond what an average adult person *in any community* would consider to be portrayals of sexual conduct worthy of protection." *Id.* at J35 (emphasis added).

[28] We note that, under the most recent amendments to Section 223(b), the Commission no longer has the power to impose the penalties that Section 223(b)(3) authorized at the time Sable filed its jurisdictional statement. Although the FCC continues to have the power to penalize dial-a-porn providers under its general authority to impose forfeiture penalties for "willful[ ] and repeated[ ]" violations of the Communications Act (47 U.S.C. 503(b)(1)(B)), that general forfeiture authority extends only to the imposition of a $2,000 penalty for each violation, subject to a prescribed $5,000 limit (47 U.S.C. 503(b)(2)). That is a far smaller

3. In any event, Section 223(b) survives Sable's facial attack whether the statute incorporates national or local standards for obscenity. Of course, if obscenity may be defined by reference to national standards in the present setting, Sable's challenge fails by its own terms. And even if the First Amendment requires application of local community standards, Section 223(b) is valid on its face.

That the statute regulates obscenity at the federal level is in no way inconsistent with the application of local community standards. The validity of federal obscenity laws is well settled. This Court has held that Congress may enact federal laws prohibiting the mailing of obscene materials, *Hamling* v. *United States*, 418 U.S. 87 (1974), the broadcasting of obscene messages, *Pacifica*, *supra*, the movement of obscene items in interstate commerce, *United States* v. *Orito*, 413 U.S. 139 (1973), and the importation of obscene films, *United States* v. *12 200-ft. Reels of Film*, 413 U.S. 123 (1973). As observed by both the district court in these cases and the Second Circuit in *Carlin III*, Section 223(b) "does not create an impermissible national obscenity standard any more than [these other] federal laws." J.S. App. A4 (quoting *Carlin III*, 837 F.2d at 561).

Further, there is ample opportunity for Sable to insist on application of local community standards if and when an action is brought against it. Thus, a criminal prosecution under Section 223(b) would be brought in a particular federal district court and, if the defendant wishes, tried to a

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penalty than is available in a criminal prosecution under Section 223(b). Accordingly, it is speculative whether an administrative proceeding would ever be brought against Sable; none has been brought to date. These circumstances reinforce the conclusion that any argument based on the alleged invalidity of the standards used in administrative enforcement should await an attempt to enforce the statute through an administrative proceeding, in which, both before the Commission and on review in the courts, Sable could raise its challenge. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. at 501 (citation omitted) (Court should not "'anticipate a question of constitutional law in advance of the necessity of deciding it'").

local jury. In such a case, *Miller* provides that a federal juror would "draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." *Hamling* v. *United States*, 418 U.S. at 105; accord *Smith* v. *United States*, 431 U.S. 291, 302 (1977). There is similar opportunity for application of local standards in an ordinary administrative enforcement action. If the Commission initiates an administrative forfeiture action for a penalty under 47 U.S.C. 503(b)(1)(B) based on a willful or repeated violation of Section 223(b), enforcement of the penalty takes place through a de novo trial in a district court in a particular local community. 47 U.S.C. 504(a). See J.S. App. J33-J34 (Commission decision noting that court might apply local standards in enforcing penalty).[29] Accordingly, Section 223(b) may be enforced through mechanisms that allow for the application of local community standards to determine obscenity.[30] The argument that obscenity under Section 223(b) must be judged under local community standards should await an as-applied challenge, where such standards can be applied if they are found constitutionally required. See *Carlin III*, 837 F.2d at 561.

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[29] If the Commission were to choose to assess penalties through a formal hearing pursuant to 47 U.S.C. 503(b)(3), which it has never done in enforcing Section 223(b), evidence may be taken on local standards in the hearing, and judicial review may be in the local court of appeals. If those means were considered inadequate to ensure the application of local community standards (and such standards were required), it may be that Section 223(b) cannot be enforced by that means. But that possibility does not invalidate Section 223(b) on its face, because the other avenues for enforcing Section 223(b) remain open.

[30] The recent amendments to Section 223(b) eliminated the provisions giving the FCC and Attorney General direct civil enforcement authority. See pages 16-17, *supra*. Those enforcement mechanisms, should they be reinstituted, would provide the same opportunity to apply local standards as do the current enforcement mechanisms.

If local standards are to be applied, Section 223(b) is not rendered invalid simply because Sable may feel compelled not to offer messages that would be considered obscene by the average person in the least tolerant communities. The First Amendment and *Miller* permit prosecution of dial-a-porn providers who make telephone messages available to communities that consider them obscene. If Sable does not wish to expose itself to nationwide prosecution or penalties, it should not distribute potentially obscene materials on a nationwide basis. Sable's predicament is nothing more than the inevitable consequence of a decision to enter a business that uses a telephone network that is inherently national in reach.

At bottom, Sable claims a constitutional right to disseminate its messages to communities that would consider them obscene as long as its messages would not be considered obscene in some other community in the United States. Far from compelled by *Miller*, such a right is plainly inconsistent with that decision. As the Court stated, "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." 413 U.S. at 32. Similarly, the First Amendment does not require that a community in the United States endure messages from Sable that it considers obscene simply because they are simultaneously made available to persons in communities that tolerate such messages.[31]

Finally, contrary to Sable's suggestion (88-515 J.S. 14-16), Section 223(b)'s ban on obscene speech is not unconstitutionally vague, as the district court also implicitly recognized. By employing the term "obscene," Congress "la[id] down by legislative act an intelligible principle to which the

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[31] To the extent that Sable has specific venue objections to a future enforcement action, they are appropriately raised at that time, not in a facial challenge to the statute. See *Carlin III*, 837 F.2d at 561.

[Executive] * * * is directed to conform." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928). At least since *Miller*, whose standards Section 223(b) incorporates, the word "obscene" has had a sufficiently clear legal meaning to overcome vagueness objections. *Miller*, 413 U.S. at 27; *Hamling* v. *United States*, 418 U.S. at 118 (the term is "sufficiently definite in legal meaning to give a defendant notice of the charge against him").

Moreover, the "contemporary community standard" requirement is not vague when construed to incorporate national standards, any more than it is when construed to incorporate local standards. And in any event, if national standards are to be used, any vagueness challenge is premature, as no such standards have been formulated.[32] Finally, even if such standards were found unduly vague, the remedy would not be facial invalidation of Section 223(b) but, rather, incorporation of local standards so as to comply with the First Amendment. Sable's facial attack on Section 223(b) therefore cannot be sustained on vagueness grounds.

B. The Statute's Ban On Obscene Telephone Messages Is Severable From Its Ban On Indecent Telephone Messages

The district court also properly concluded (J.S. App. A4-A5) that Section 223(b)'s ban on obscene telephone messages is severable from the statute's prohibition of indecent telephone messages. The obscenity ban can stand on its own, and there is no reason whatever to believe that Congress intended to ban obscene telephone messages only if it could also ban indecent messages. Even if the indecent-speech ban is invalid, therefore, the obscenity ban must survive.

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[32] In *Intercambio*, *supra*, the Commission found that the messages in question were "patently offensive and * * * [went] well beyond what an average adult person *in any community* would consider to be portrayals of sexual conduct worthy of protection." J.S. App. J35 (emphasis added).

"Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent." *Regan* v. *Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); see *id.* at 692 (opinion of Powell, J.). Thus, "'"[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."'" *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)). If the constitutionally unobjectionable portion of a statute can function independently in the manner contemplated by Congress, then "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines*, 480 U.S. at 685 (footnote omitted).

Section 223(b)'s ban on obscene commercial interstate telephone messages plainly can stand independently of the ban on indecent messages, and severability clearly comports with the will of Congress if the Court should hold the indecency ban invalid. See *Carlin III*, 837 F.2d at 561. First, as Congress was undoubtedly aware, the Communications Act of 1934 generally provides for severability in the "strongest possible language." *Pacifica*, 438 U.S. at 739 n.13. See 47 U.S.C. 608 ("If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder • • • shall not be affected thereby"). In addition, in the most recent revision of Section 223(b), Congress deliberately placed the prohibition against obscene messages in a separate subsection from that containing the prohibition against indecent messages. See pages 3, 17, *supra*. That action confirmed what was already apparent from the use of the disjunctive "obscene or indecent" in the 1983 and Hawkins-Stafford versions of Section 223(b)—that

Congress intended the ban on obscene speech to stand independently of the ban on indecent speech. In view of Congress's focused concern about the "devastating impacts" that dial-a-porn, whether obscene or indecent, was having on young children (134 Cong. Rec. H1713 (daily ed. Apr. 19, 1988) (statement of Rep. Coats); see pages 30-31, *supra*), its expressed intent to "ban dial-a-porn in whatever possible way" (134 Cong. Rec. H1699 (statement of Rep. Coats) (daily ed. Apr. 19, 1988)), and its recognition of the separate legal analysis required for obscene and indecent speech (see sources cited pages 14, 18, *supra*), it is plain that Congress, in both the 1983 enactment and the Hawkins-Stafford Act, intended the ban on obscene dial-a-porn to remain even if—contrary to our submission—the ban on indecent dial-a-porn were held invalid.[33]

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[33] In 1988, Rep. Bliley and other Members of Congress complained that, in their view, Section 223(b) as passed in 1983 had effectively legalized obscene and indecent telephone messages, which they believed had been unlawful prior to 1983 under Section 223(a), 47 U.S.C. 223(a). That provision states, in pertinent part, that whoever "by means of [interstate] telephone[,] • • • makes any comment • • • which is obscene, lewd, lascivious, filthy, or indecent" thereby commits a crime. Those Members disagreed with the FCC's view that Section 223(a) applies only to calls placed by the person making the proscribed remarks. Hence, Rep. Bliley stated: "[i]t was not until 1983 that obscene and indecent communications over the telephone became legal," and the purpose of the new amendments was to "restore, not change," the pre-1983 state of the law. 134 Cong. Rec. H1691, H1806 (daily ed. Apr. 19, 1988). Accord 134 Cong. Rec. E1111 (daily ed. Apr. 19, 1988). (statement of Rep. Dannemeyer). Rep. Bliley further observed that if Section 223(b) were not amended to eliminate the safe-harbor provision and to ban dial-a-porn entirely, Congress would have effectively voted "to maintain the only place in the entire United States Code where commercial obscenity is given legal protection." 134 Cong. Rec. H1709 (daily ed. Apr. 19, 1988). Those remarks reinforce the conclusion that Congress did not intend to allow obscene telephone messages to escape proscription by Section 223(b) even if that proscription could not constitutionally reach indecent communications.

CONCLUSION

The judgment of the district court holding Section 223(b) unconstitutional insofar as it applies to indecent speech should be reversed. The judgment holding Section 223(b) constitutional insofar as it applies to obscene speech should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JOHN R. BOLTON
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
RICHARD G. TARANTO
Assistant to the Solicitor General
BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

DIANE S. KILLORY
General Counsel
Federal Communications Commission

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In the Supreme Court of the United States

October Term, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT/CROSS-APPELLEE

LAURENCE H. TRIBE
Counsel of Record—
BRIAN STUART KOUKOUTCHOS
KENNETH J. CHESEBRO
GENE B. SPERLING
1525 Massachusetts Avenue
Cambridge MA 02138
(617) 495-1767

Of Counsel:

RICHARD K. SIMON
LEE L. BLACKMAN
BETH KIRK
McDERMOTT, WILL & EMERY
2029 Century Park East
Los Angeles, CA 90067

LAWRENCE E. ABELMAN
NORMAN S. BEIER
ABELMAN FRAYNE REZAC & SCHWAB
708 Third Avenue
New York, NY 10017

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

This case involves the constitutionality of a federal statute, § 223(b) of the Communications Act of 1934, as amended (47 U.S.C. § 223(b)), which imposes substantial criminal penalties upon anyone making either an "obscene" or an "indecent" interstate communication by telephone for commercial purposes.

The consolidated appeal and cross-appeal present the following questions:

1. Does § 223(b) unconstitutionally abridge freedom of speech by criminalizing the interstate transmission of all "indecent" telephone messages, including the non-obscene, to adults who have chosen to hear such speech?

2. Is § 223(b)'s standard for criminalizing "indecent" telephone messages unconstitutionally vague?

3. Where a sender of frankly sexual messages wishes to make them available only to communities where the messages are not regarded as obscene, but is denied this control by Congress' failure to require telephone companies to make such screening possible for the message senders, does § 223(b)'s ban on "obscene" interstate telephone communication:

(a) impose a content-based condition on the use of telephone services that advances no legitimate purpose?

(b) necessitate the use of a single, "national" standard for obscenity that conflicts with *Miller v. California*, calls for delicate policy judgments beyond the province of the federal courts, and intrudes on values of state and local autonomy?

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STATEMENT OF THE CASE

Sable challenges § 223(b) of the Communications Act of 1934, 47 U.S.C. § 223(b), as amended ("§ 223(b)"), because it indiscriminately prohibits the transmission by telephone of constitutionally protected, non-obscene speech, in derogation of the rights of consenting adults to hear such speech; because the statute fails to define what speech is proscribed in terms which give fair notice to those who must conform to it or reasonable guidance to those who must enforce its substantial criminal penalties; and because the statute's proscription of obscene telephone programs is not tailored to conform to the mandate of *Miller v. California*, 413 U.S. 15 (1973), that the standards of the community to which a publication is directed, as applied by that community, are to govern prosecution.

The Operation of Sable Communications, Inc.

Sable Communications, Inc., is a California corporation with an office in Los Angeles. Since 1983 Sable or its affiliates have offered adult-oriented recorded messages in the Los Angeles area code (213) through the Pacific Bell telephone network. Sable's messages have spanned the spectrum from suggestive double-entendre and fantasy encounters involving non-explicit descriptions of kissing and embracing, to some messages that are frankly sexual. Like most telephone companies—both the Bell Operating Companies spun off through the break-up of the AT&T telephone monopoly and the other "local exchange carriers" (LECs)—Pacific Bell maintains a dedicated two-way system known as the 976 Information Access Service ("976") that allows numerous callers to access simultaneously a specific seven-digit telephone number for the purpose of listening to a wide variety of pre-recorded messages.[1] Callers to such numbers are charged a fee

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1. The system in issue here is but one variation of a virtually unlimited number of computerized information storage and retrieval systems employing audio, video, and computer inter-

(Continued on following page)

by Pacific Bell which is then divided between the phone company and the message provider, such as Sable.

The means to limit a 976 message provider's lines to callers from the targeted local area lie entirely in the hands of the message provider's local exchange carrier. Various technologies such as centralized exchange blocking exist to ensure that only those in targeted areas can access such messages. For example, providers of adult messages can be assigned by the local phone company to a secured telephone exchange, in which customers of that phone company must notify the company in writing if they wish to have the particular exchange unblocked.[2] It is then a simple matter for the phone company to refuse unblocking for customers in regions that a given message-sender does not wish to reach. At present, Pacific Bell employs no technology to prevent callers outside the local area code from accessing Pacific Bell's 976 message services. Federal law leaves the local exchange carriers and their state regulators entirely free to decline all use of such technology—even where, as here, the result is that message providers such as Sable receive no revenue for many of the long-distance calls they are forced to accept, because the entire fee charged to the caller is retained by Pacific Bell and the interstate telephone carrier.

The upshot of this legal arrangement is that, although Sable designs and intends its messages exclusively for the entertainment of adults within the local area code who desire to hear them and does not seek access by callers out-

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(Continued from previous page)

action. While "976" is perhaps the most commonly discussed information access service, the same technology and the same telephone lines are currently used for such diverse services as LEXIS, WESTLAW, other computer data bases, electronic publishing, credit card billing confirmation, electronic banking, airline reservations systems, telemarketing, voice storage and retrieval, and electronic mail, among others. *See The Geodesic Network, 1987 Report on Competition in the Telephone Industry*, U.S. Department of Justice (January 1987) at 1.23-1.30.

2. *See Fabulous Associates v. Penn. Public Utility Comm'n*, 693 F.Supp. 332, 339 (E.D.Pa. 1988).

side the local community, it cannot prevent such access. Its only choice, if it wishes to avoid prosecution and conviction in areas where some of its adult messages would be deemed obscene, is to refrain from providing those messages to areas where they would be fully protected and indeed welcomed.[3]

There is no dispute that Sable has always conducted responsible advertising campaigns aimed only at consenting adults. Despite the Government's innuendo (GB 6-7, 28), Sable has never engaged in such practices as leafletting cars or homes, and has never provided the perverse sorts of messages that "Sable's affiliate" (GB 6) produced in 1983 and has never provided since.[4] Sable's 976 numbers are advertised exclusively in adult magazines that are not offered for sale to minors. Sable's pre-recorded messages are not broadcast; they are replayed electronically only in response to phone calls to its 976 numbers, and therefore raise no spectre of a captive audience or of unwanted intrusion into either public life or private homes.

The Genesis and Development of § 223(b)

Sable's facial challenge to § 223(b) does not in itself require inquiry into the legislative process behind the statute. However, since the Government seeks to justify § 223(b)'s ban on what the Government concedes is constitutionally protected speech by reference to Congress' sup-

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3. Of the calls to Sable's New York affiliate, Carlin Communications, Inc., in 1983 and 1984, eighty percent were local and twenty percent long distance. *Carlin Communications v. F.C.C.*, 749 F.2d 113, 115 (2d Cir. 1984).

The threat is quite real that federal prosecutors will journey to the areas of the country with standards least tolerant of adult materials and prosecute message senders there regardless of their attempts to avoid receiving calls from these areas. That threat is borne out by the record of federal prosecutions (brought under statutory regimes preceding the current § 223(b)), based on calls made from Utah to firms in New York and California which had carefully sought to avoid any operations in that state. *See Hearings, infra* note 5, at 215-16 (statement of Brent Ward for the Department of Justice).

4. Even during that brief period, only a handful of the thousands of messages offered by that company contained such extreme material.

posed "findings" about "dial-a-porn", we direct the Court's attention to certain matters omitted from the Government's account of § 223(b).

With the advent of adult telephone services in the early 1980's, Congress became concerned with how an accommodation could be reached between the rights of adults to hear such protected speech and regulations reasonably designed to help parents control access by minors. As a result, Congress created a statutory structure to prohibit obscene or indecent interstate communication for commercial purposes to any person under the age of 18, while giving an absolute defense to providers if they followed FCC regulations for restricting minors' access. In instructing the FCC to devise such "safe harbors," Congress was sensitive to the demands of the First Amendment, as indicated by the comments of § 223(b)'s cosponsor, Representative Kastenmeier:

> Congress intends that the FCC promulgate reasonable time, place, and manner restrictions calculated to restrict access to prohibited communications by persons under 18 years of age.
>
> Under the Supreme Court's holding in *Butler v. Michigan*, 352 U.S. 380 (1957), Congress cannot expect the FCC to impose blanket restrictions on dial-a-porn services if time, place, and manner restrictions are technically infeasible or impracticable. In *Butler*, the Supreme Court struck down as unconstitutional a statute that had the effect of preventing adults from having access to materials judged to have a potentially deleterious influence on children. *Id.* at 382-83. The Court explained that the statute would have reduced the adult population to reading only what was fit for a child. *Id.* at 383. The principle is equally applicable here, and so we have carefully constructed § 223, as amended, to avoid reducing the adult population to hearing only what is fit for a child. We leave it to the FCC to prescribe the specific regulations that permit adult access while limiting children's access. If, however, no such regulations are feasible, then less restrictive measures rather than broader re-

> strictions will have to suffice to avoid any constitutional infirmity.

129 Cong. Rec. E5966 (daily ed. Dec. 14, 1983).

The FCC initially tried to satisfy the First Amendment concerns endorsed by Congress in enacting § 223(b) by creating a defense to prosecution if the message provider either operated solely between 9:00 p.m. and 8:00 a.m. Eastern Time or required payment by credit card prior to transmission of its messages. *Report and Order*, 49 Fed. Reg. 24,996 (1984). In *Carlin Communications, Inc. v. FCC* (*Carlin I*), 749 F.2d 113 (2d Cir. 1984), a unanimous panel of the Second Circuit Court of Appeals set the regulation aside, noting that it did not "warrant the special treatment that the [Supreme] Court has espoused in some contexts," such as media broadcasts. *Id.* at 120. "The regulation concerns a telephone service that requires dialing on the part of the would-be listener, as opposed to a public display, an unsolicited mailing, or other means of expression as to which the receiver has no chance to withhold his or her consent." *Id.* at 120. The court held that "the FCC has failed adequately to demonstrate that the regulatory scheme is well tailored to its ends or that those ends could not be met by less drastic means." *Id.* at 121. The court was also concerned that the FCC had not fully explored reasonable technological alternatives for blocking and screening that would be "less restrictive of adults' freedom to hear what they want when they want to hear it." *Id.* at 122.

Thereafter, the FCC adopted its *Second Report and Order*, 50 Fed. Reg. 42,699 (1985), promulgating revised regulations which maintained the credit card payment defense but substituted an authorized access or identification code for the previous time-of-day defense. These regulations, the FCC concluded, offered "the most effective method currently available to restrict access by minors without unduly impairing adults who want to hear the messages." *Id.* at 42,706 n. 54.

In *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) (*Carlin II*), the Court of Appeals again

set aside the FCC's regulations, but only as applied to message providers in the New York telephone system, which was not then configured to permit the interactive communication needed to process credit card or access numbers. The court noted in particular the FCC's failure to consider fully customer premises blocking (with costs to be borne by message providers):

> On the record before us, it may well be that the least restrictive means for complying with the congressional mandate lies in this now plainly feasible device available from various manufacturers.

Id. at 855.

In May, 1987, the FCC issued its *Third Report and Order*, 52 Fed. Reg. 17,760 (1987), establishing a defense to prosecution if the message provider required payment by credit card, required an access code, or scrambled its messages so that receipt would require a home descrambling device. The Court of Appeals upheld these regulations in *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir. 1988) (*Carlin III*), *cert. denied*, 109 S.Ct. 305 (1988). The Court of Appeals summarized its extensive review of the record developed in the FCC proceedings, and the FCC's findings thereon:

> As a preliminary matter, we find that the record supports the FCC's conclusion that a scheme involving access codes, scrambling, and credit card payment is a feasible and effective way to serve this compelling state interest.

837 F.2d at 555.

The court concluded that the regulations did not unreasonably restrict adult access to protected speech, comparing them to the use of "blinder racks," sealed wrappers and adults-only sections in bookstores for sexually oriented materials. The court also upheld the FCC's rejection of alternative proposals and directed the FCC to continue to investigate new technologies:

> When [a beep-tone] device or any other less restrictive technology becomes available, we direct the FCC

> to reopen its proceedings to consider the costs and benefits of adding its use as an optional defense. In this way, the Government can fulfill its 'heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression.' *Carlin I*, 749 F.2d at 121.

Id. at 556.

The Court of Appeals then considered whether § 223 (b)'s use of "obscene or indecent" was, as contended, vague and overbroad. Assuming that Congress intended "indecent" to be interpreted as defined in *FCC v. Pacifica Foundation*, 438 U.S. 726, 732 (1978), the court found that telephone calls over a private line differed "significantly" from a public broadcast, and that the *Pacifica* decision justified neither the regulation of indecent telephone messages nor a criminal prosecution. *Id.* at 560. Accordingly,

> Were the term "indecent" to be given a meaning other than *Miller* obscenity, we believe the statute would be unconstitutional.

Id. Unable to resolve conclusively what Congress had intended, the court held that the words "or indecent" were in any event severable and that the statutory prohibition of obscene speech, as severed, was constitutional. *Id.* at 561.

On September 30, 1987, after *Carlin III* had been argued but before the Second Circuit had issued its opinion, the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce of the House of Representatives convened a hearing[5] on proposed amendments to § 223(b) that would "eliminate completely so-called dial-a-porn operations . . . ." 133 Cong. Rec. S16794 (daily ed. Dec. 1, 1987) (statement of Sen. Helms.)[6]

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5. *See Telephone Decency Act of 1987: Hearings on H.R. 1786 Before the Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1987) (hereafter *Hearings*).

6. H.R. 1786 was originally introduced by Representative Bliley in March, 1985, prior to *Carlin II*. An identical measure was subsequently introduced in the Senate in December, 1987 by Senator Helms.

The Subcommittee was gravely concerned with the constitutionality of a total ban on "indecent" telephone communications.[7] Its concerns were echoed in the testimony of Diane S. Killory, the FCC's General Counsel:

> Because H.R. 1786 attempts to ban the dissemination of indecent communications to all persons, including consenting adults, there may be serious problems in sustaining the constitutionality of such legislation. Let me suggest a perhaps more legally sustainable approach: Obscene interstate transmissions would be prohibited outright; but essentially the current scheme as to indecent messages—by which minors' access is restricted—would be retained.

Hearings at 213 (statement of Diane S. Killory, General Counsel, FCC).

To the same effect was the prepared testimony of United States Attorney Brent Ward, speaking "on behalf of the Department of Justice":

> In our view H.R. 1786 would impose an undue burden on protected speech because it would prohibit indecent 'dial-a-porn' messages outright, without any allowance for the right of adults to have access to such messages. Therefore, we recommend that appropriate time, place or manner restrictions, such as the access code rule adopted by the FCC, be retained in the law, but be applicable to the communication of indecency only.

Hearings at 224.

The Department also stressed that such restrictions would be effective in dealing with the problem of minors accessing adult messages:

> MR. NIELSON. Let me ask the question I asked the previous panel. Do any of the current alternatives by the FCC—that is the access codes, the credit cards, or the scrambling—do any of those provide a foolproof way of limiting dial-a-porn access to adults only?

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7. *See, e.g., Hearings* at 2 (Statement of Chairman Markey); *id.* at 19 (Statement of Rep. Richardson).

> MR. WARD. I think that—it's not foolproof, but I think the access code requirement and the screening option, both provide the means of dramatically reducing the number of calls from minors in the United States, almost eliminating them. So I think that it would be a very effective way to do it.

Hearings at 231.

The hearing lasted only three hours, and little if any actual *evidence* was presented on the nature of the underlying problem.[8] The paucity of evidence, testimonial or otherwise, is underscored by the fact that the Government is unable to cite to any evidence or findings and must rely solely on the conclusory statements of § 223(b)'s supporters in Congress. (GB 13, 31). Nor did the Subcommittee receive evidence testifying to the alleged insufficiency of the technological solutions which the FCC had in fact found to represent a feasible and minimally restrictive means to achieve the governmental interest.[9] Among the few genuine facts adduced was one offered by the FCC:

> Since September 1985 the Commission has received about 310 written complaints relating to the inter-

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8. Second- and third-hand stories recounting instances of minors gaining access to adult messages were presented to the Subcommittee. Several are noted in the Government's Brief. Characteristic of the evidentiary basis for Congress' "findings" is a purported transcript, presented as an appendix to a legal memorandum attached to the prepared unsworn statement of a representative of Citizens for Decency Through Law, of an interview between a representative of that organization and the mother of the caller, a mentally-retarded adult. *Hearings* at 91-95.

9. Mr. Helgeson of NYNEX Corp. did *not*, as stated in the Government's Brief (p. 13), testify that central office blocking would cost $35,000,000 for New York alone. He stated that NYNEX's "original estimates" were in that range, that central office blocking would be relatively simple with newer equipment and that he had no current cost information. *Hearings* at 116-117. He nevertheless advocated blocking, as well as scrambling and the use of "PIN" numbers. *Hearings* at 133.

> state transmission of adult messages. During this same period, the Commission Common Carrier Bureau received a total of about 12,000 complaints on all telephone issues. The lion's share of those relate to billing disputes and other complaints against common carriers. Of the 310 complaints relating to dial-a-porn, about 90% are general complaints about the existence of adult message services, which do not present any specific facts or alleged violations of Section 223 which we can investigate.

Hearings at 208-09.

There was concurrence on all sides that deference to First Amendment principles through enforcement of the regulations already promulgated by the FCC was the appropriate course of action.[10]

Members of the Subcommittee were plainly frustrated with the judicial process which had delayed enforcement of the statute,[11] and only the most cursory attention was

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10. *Hearings* at 129-131 (Helgeson (NYNEX) advocating a "Chinese menu" method; Vander Ark (Michigan Decency Action Council, Inc.), "I believe the access code and scrambling probably offer the best possibilities, if they are rigidly enforced, but I would have to agree with Mr. Helgeson, I don't think they have been tried"; Swindell (Citizens for Decency Through Law, Inc.):

> "Mr. NIELSON. But neither of you are willing to make a blanket ban on indecent communication per se?
>
> Mr. SWINDELL. Not any more than any Congressman or Senator is willing to make a blanket thing on any of the hearings I have been hearing for the last 2 weeks, Mr. Congressman.")

See also statements of Department of Justice and FCC, *supra*.

11. "In the face of the FCC's—thus far—unsuccessful attempt to design an appropriate regulatory framework, H.R. 1786 seeks to make illegal all commercial provision of obscene or indecent telephone speech," *Hearings* at 2 (statement of Chairman Markey); "Twice the FCC has tried to make rules that permit access to dial-a-porn by adults only: Twice they have been rejected by the courts. While the FCC is now trying again, we cannot be optimistic that the third time will be a charm." *Id.* at 28 (statement of Representative Rinaldo); "Mr. NIELSON. Do you believe Mr. Helgesen, that we should have FCC pursue all of the

(Continued on following page)

paid to the questions whether, and to what extent, the FCC's regulations then under review by the Second Circuit in *Carlin III* would limit minors' access to adult messages. But, as noted, virtually all of the comments received favored testing those regulations prior to any amendment of § 223(b). Congress nevertheless rejected the counsel of the FCC, the Justice Department, and its other witnesses and proceeded to amend § 223(b) in April of 1988 to eliminate the FCC's regulatory function and to forbid all obscene or indecent commercial communication by telephone to any person regardless of age.[12]

Proceedings Below

Sable sought declaratory and injunctive relief against § 223(b) in the Central District of California on the grounds that the statute is unconstitutionally overbroad and vague and that it creates an impermissible national standard of obscenity. JS(88-515) F5-F6. The district court entered a preliminary injunction enjoining enforcement of § 223(b) against any allegedly indecent communications but severed that portion from the remainder of the statute and sustained the prohibition of obscene communi-

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different remedies before Congress acts on this issue? They have tried three things, none of which have worked. Shall we continue with FCC trying more and more things before we act, so that you can be protected in your own business?" *Id.* at 129; "I also think that it is important that we note that the FCC, the Federal Communications Commission, has attempted to address this issue, but obviously has little ability to do so, without some change in the statute." *Id.* at 19 (statement of co-sponsor Representative Tauke).

12. Prohibitions against indecent messages and obscene messages are now separately treated, thus mooting Sable's contention that the statute's ban on "obscene or indecent" communications (JS(88-515) 16-17) was not severable. The balance of the statute, and its impact upon Sable's First Amendment rights, are substantially unaltered. Sable's appeal is accordingly not moot. The FCC remains empowered, under 47 U.S.C. §§ 503(b)(1) and (2), to assess civil forfeitures for "willful or repeated" violations of § 223(b).

cations. JS(88-515) A1-A5. This appeal and cross-appeal followed.

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SUMMARY OF ARGUMENT

More than 30 years ago, in a decision that recognized the fundamental role played in our constitutional order by the twin principles of free speech for adults and parental control for children, this Court invalidated a statute barring the introduction "into any family, school or place of education" of any book, magazine, picture, or recording containing "obscene, immoral, lewd or lascivious" language or material. *Butler v. Michigan,* 352 U.S. 380, 381, 383 (1957). As Justice Frankfurter wrote for a unanimous Court, purging an entire medium of protected speech that is "not too rugged for grown men and women in order to shield juvenile innocence . . . is to burn the house to roast the pig." *Id.* No Justice dissented when this Court applied *Butler* a quarter of a century later to strike down an Act of Congress prohibiting the mailing of unsolicited advertisements for contraceptives—condom ads that some parents might deem "indecent" for their young children to see and read. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60 (1983). "The level of discourse reaching a mailbox," Justice Marshall wrote for the Court, "simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 74; *accord id.* at 78-80 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment).

With the advent in the early 1980s of adult telephone services, there arose a new but not altogether different arena in which our society's capacity to preserve parental control without sacrificing freedom of speech has been put to the test.

In 1988, Congress abruptly jettisoned a half-decade of efforts by the FCC and the courts to accommodate the rights of adults to seek out and listen in the privacy of their homes to sexually suggestive or explicit messages de-

signed for them and directed to them, and the rights and responsibilities of parents to determine what sorts of things their children should be able to hear. Prior regulations had been characterized by a narrow focus and a decentralized approach—banning interstate communication to minors of obscene and indecent materials, but only where providers failed to follow the FCC's various time, place, and manner rules designed to facilitate family-by-family blocking-out of messages that parents, and not the federal government, deemed unsuitable for their children.

Despite the FCC's 1987 conclusion that it had arrived at an effective combination of technological and regulatory means for restricting parentally unauthorized access by minors without unduly impairing the free speech rights of adults, and despite the lack of any evidence or finding that the FCC was wrong, Congress last year upped the ante by changing the goal. Impatient with more measured steps, Congress decided to demand a solution so child-proof that *no* minor, however enterprising, could *ever* break through and hear an obscene or indecent message. That impossible goal yields no limiting principle and produced the quite limitless statute at issue in this case—a flat ban on all interstate telephone communication, for commercial purposes, of "obscene" or "indecent" messages.

In *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978), this Court upheld federal regulatory authority to assist parents in controlling their children's exposure to sexually suggestive or "dirty" words on daytime radio. The Court stressed that it was approving no around-the-clock ban on all such talk even on the radio, a medium the Court recognized as uniquely subject to regulation. And even the Government concedes that *Pacifica* is not authority for a flat ban, and especially a criminal prohibition, on all "obscene" or "indecent" interstate telephone communications, particularly those deliberately initiated by listeners knowledgeable about how to access such messages.

Such a ban is fatally overbroad: much of what it outlaws is fully protected speech, and there are less restrictive

means for helping parents control their children. That those means are not totally fail-safe is true but immaterial. That is the nature of law, and accepting the Government's unattainable standard of perfection would doom the First Amendment by reducing the adult population to hearing, seeing, and reading "only what is fit for children." *Butler*, 352 U.S. at 383. The ban is also fatally vague: indecency, like beauty, is in the eye of the beholder; as a standard for defining crime, it is more a question than an answer.

To the extent that it struck down the indecency ban, the district court's judgment should therefore be upheld. But it should be reversed to the extent that it sustained the obscenity ban. For, unlike a federal ban on interstate *mailing* of obscene materials, which may be enforced, as contemplated in *Miller v. California*, 413 U.S. 15, 30-32, 36-37 (1973), by applying local criteria of patent offensiveness and unacceptably prurient appeal, a federal ban on interstate *telephone* talk that is "obscene" cannot be enforced in this decentralized manner unless all of the relevant telephone companies take steps to make telephonic communications as geographically targetable as communications by mail have always been. When one places calls, one can of course decide where to direct them; a ban on outgoing obscenity by phone is thus easier to implement in terms of the standards of the target community. But when one is on the receiving end of the telephone, picking and choosing among one's callers can get tricky—especially if one wants to greet them with a pre-recorded message, as the First Amendment of course entitles one to do. Tricky, but not impossible: the technology for blocking access to callers from designated areas—areas in which one's message would be obscene or otherwise illegal—is readily available, and may be deployed at the message-sender's expense if the phone company agrees to provide the blocking or screening capacity for an appropriate price.

If Congress were to require telephone companies to do just that, then prosecuting message-senders who fail to withhold their messages from those communities where the

messages violate constitutionally adequate standards of "obscenity" would replicate federal prosecution of those who deliberately mail films or magazines to places whose obscenity standards those materials violate. But since Congress has *not* required telephone companies to take any such steps, the prosecutions threatened by § 223(b)(1)'s obscenity ban put message-senders to an impermissible choice between muzzling themselves with respect to constitutionally protected messages they wish to make available to callers from places where the messages are both lawful and welcome, and exercising the First Amendment right to make those messages available but virtually inviting criminal prosecution for failing to keep the messages from the ears of people in cities and towns where those messages are properly banned.

Congress had reasonable and less burdensome alternatives to the creation of this double bind; by rejecting those alternatives in favor of a flat criminal prohibition coupled with no requirements on the telephone companies, Congress did to the country in § 223(b)(1)(obscenity) what it did to adults in § 223(b)(2)(indecency): it reduced every community in the nation to hearing over the telephone what the most sensitive communities are prepared to hear. This is "legislation not reasonably restricted to the evil with which it is said to deal." *Butler*, 352 U.S. at 383. Just as government may not quarantine the general public against all the messages that some parents would choose to withhold from their children, so it may not quarantine the country as a whole against all the messages that some communities would choose to withhold from their citizens. The cardinal principle is that the First Amendment cannot countenance conditioning speech on a speaker's willingness to play the role of parent to the most adventuresome youth and the role of guardian for the least tolerant community. To do that is to curtail without sufficient cause "one of those liberties . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Butler*, 352 U.S. at 384.

I. SECTION 223(b)'S FLAT BAN ON "INDECENT" TELEPHONE COMMUNICATION CANNOT BE RECONCILED WITH THE FREE SPEECH AND DUE PROCESS CLAUSES.

Section 223(b)(2)'s prohibition of "indecent communication for commercial purposes" is unconstitutionally overbroad on its face. It is clear that this provision suppresses a substantial amount of constitutionally protected, non-obscene speech. Nor can it be doubted that § 223(b)(2) is not a mere time, place or manner restriction, but an outright ban on "indecent" speech—an unprecedented and radical expulsion of an entire category of protected expression from an entire communications medium. The Government tacitly concedes that Sable may challenge the indecency ban on its face because "it has not been disputed in this case that Sable also sells indecent speech, or would do so if permitted (especially if prohibited from selling obscene speech)." (GB 20 n.13).[13]

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13. In a later footnote, the Government quixotically attempts to evade Sable's facial challenge to § 223(b)(2)'s ban on "indecent" speech by baldly asserting that outright obscenity (banned by § 223(b)(1)) is the only germane issue, supposedly because "virtually all of Sable's 'frankly sexual' messages not only meet the definition of 'indecent speech' incorporated in § 223(b) but also, taken as a whole, appeal to the prurient interest." (GB 23 n.15). Putting the Government's own aforementioned concession aside, this position cannot be squared with prior rulings of the lower courts in this case. The district court found that Sable's expression "has been 'chilled'—it has 'softened' its messages" out of fear of prosecution under the indecency provision. J.S. (No.88-515) A2. And the Ninth Circuit Court of Appeals found that the possibility of prosecution of Sable under § 223(b)(2) "is more than just a hypothetical threat. The government . . . has specifically declined to agree not to enforce the statute against Sable." *Sable Communications of California, Inc. v. FCC*, 827 F.2d 640, 643 (9th Cir. 1987). That court specifically adverted to the particular criminal penalties which Sable faces under § 223(b)(2), which bans indecent rather than obscene speech. *Id.* at 643-44. Moreover, prosecution under the indecency provision obviously remains a threat even if the same speech could be punished under the obscenity provision, because by proceeding under § 223(b)(2) the Government would avoid the burdens of meeting the far more onerous obscenity standard of *Miller v. California*, 413 U.S. 15 (1973).

A. The Ban On "Indecent" Communication Suppresses A Substantial Amount of Speech Protected By The First Amendment.

There is no dispute that the "indecent" speech suppressed by § 223(b)(2) includes much expression that, by definition, is not obscene, and is therefore protected by the First Amendment. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65-66 (1963). "Indecent but not obscene material . . . qualifies for First Amendment protection whether or not it has serious merit." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C.Cir. 1988). Nor is there any disagreement that § 223(b)'s prohibition of "indecent communication for commercial purposes" is sweeping. According to the Government, the statute bans all "sexually explicit or suggestive messages . . . that are provided for a fee over the telephone." (GB 5).[14] In *FCC v. Pacifica Foundation*, 438 U.S. 726, 740 & n.14 (1978), this Court noted that "the normal definition of 'indecent' . . . refers to nonconformance with accepted standards of morality," and includes the "altogether unbecoming," the "hardly suitable," and the "unseemly" (internal quotation marks omitted). The Government, evidently leery of so obviously unbounded a definition, urges this Court to rule (GB 18) that § 223(b)(2) embodies a congressional design to adopt the FCC standard ultimately employed in *Pacifica*, where "indecent" was defined as "language that describes, in terms patently offensive as measured by contemporary community standards for the . . . medium, sex-

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14. The Government adds that such adult messages are "typically prerecorded" (GB 5), but that is by no means universal nor is it a prerequisite for prosecution under § 223(b). The Government's attempt to exclude live, 2-way communications from the reach of Sable's constitutional challenge, *see* GB 23-24 & n.15, is unavailing. That "persons subject to the restriction can easily distinguish" between pre-recorded and live conversation, *id.*, is irrelevant to the substantiality of § 223(b)(2)'s deterrent effect where, as here, Congress deliberately and conspicuously did *not* distinguish between those two categories, subjecting both to prosecution under the identical statutory proscription. Contrast Congress' distinction between obscene and indecent communications. *See supra* note 12.

ual or excretory activities and organs . . . ." *Id.* at 732. Under this still capacious definition, the Government concedes that material may be criminalized as indecent under § 223(b)(2) and stricken from telephone calls placed by consenting adults even if it *does not*, "taken as a whole, appeal to the prurient interest," and even if it has "serious literary, artistic, political, or scientific value." (GB 18); *Hearings* at 211 (testimony of FCC General Counsel Diane Killory). The challenged statute thus outlaws commercial telephonic communication that "arouses normal sexual responses" in ordinary adults—the very sort of expression that enjoys the protection of the Constitution. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). *See id.* at 505, 507.

As the Second Circuit Court of Appeals held in *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988) (*Carlin III*), *cert. denied*, 109 S.Ct. 305 (1988), § 223(b) is "content based" and therefore subject to "exacting scrutiny." The Court must "determine whether the [statute] precisely furthers a compelling governmental interest. The interest in protecting minors from salacious matter is no doubt quite compelling. Such an interest must be served, however, only by 'narrowly drawn regulations,' that is, by employing means 'closely drawn to avoid unnecessary abridgment.'" *Id.* (quoting *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980), and *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). The Government nevertheless urges this Court to engage in further content discrimination of its own and to relegate "sexually suggestive messages" to a less robust form of judicial protection than that reserved for what the Government deems to be more worthy subjects of conversation. (GB 24-25). The Government admits (GB 25) that, outside the realm of speech which proposes a commercial transaction,[15] no majority of this Court has *ever* endorsed

15. The Government does not contend that the adult messages at issue here are "commercial speech" in this sense. The messages sold by Sable, like the bestsellers sold by bookstores and the movies exhibited by theatres, are a commercial form of entertainment.

any such proposition. "Entertainment, as well as political and ideological speech, is protected." *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981).[16] Even when the expression that the state seeks to ban is nothing more exalted than erotic nude dancing in a seedy adult book store, the state's regulation "must be narrowly drawn and must further a sufficiently substantial government interest." *Schad*, 452 U.S. at 68.[17]

Nor can the Government excuse § 223(b)'s sweeping overbreadth by asserting that, in its opinion, Sable's own adult messages may be obscene as well as indecent, and could therefore supposedly be suppressed in any event. In reviewing a time restriction on broadcasts of indecent matter in *Action for Children's Television*, the Court of Appeals for the District of Columbia Circuit ruled that "[s]tatutes or regulations 'that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.' *City of Houston v. Hill*, 107 S.Ct. 2502, 2508 (1987)." 852 F.2d at 1339. Because its claims are "rooted in the First Amendment," Sable is "entitled to rely on the impact" of § 223(b) on the "expressive activities of others as well as [its] own." *Schad*, 452 U.S. at 66. Indeed, it is *only* when a statute would have a "different impact on . . . third parties' interests in free speech than . . . on" the interests of the litigants themselves, *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984),

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16. *See also Pacifica*, 438 U.S. at 761 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment) ("I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection.").

17. "Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, [this Court] has scrutinized the governmental interest furthered by the regulation and ha[s] stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression." *Schad*, 452 U.S. at 69 n.7.

that a facial overbreadth challenge is needed. *See also id.* at 799-800, 802.

Much more than Sable's dial-it message service is at stake here. Other services providing pre-recorded messages are also threatened by § 223(b)'s ban on "indecent," "unseemly," or "unbecoming" mention of sexual and excretory acts, including "dial-a-joke" services that replay suggestive or scatalogical comedy routines, as well as the hottest new dial-it service—"rap" music messages, in which expletives and vulgar street language are de rigueur.[18] On its face, § 223(b)(2) likewise criminalizes desk-top publishing via the telephone lines of erotica, political satire, humor, poetry, short stories and cartoons that are "sexually explicit or suggestive" (GB 5) or that contain vulgar language and profanity. Commercially motivated telephone "fax" transmissions of a wide range of material constitutionally protected under the standards of the print media—including a copy of this Court's *Pacifica* opinion—could likewise be banned and criminalized, since it is no defense under § 223(b)(2) that the allegedly "indecent" matter has "serious literary, artistic, political or scientific value." (GB 18). All of this material is constitutionally protected, yet all of it falls within the far-ranging prohibition of § 223(b).

In unanimously invalidating a law criminalizing " 'recordings containing . . . immoral, lewd or lascivious language or . . . descriptions,' " *Butler v. Michigan*, 352 U.S. 380, 381 (1957) (quoting Mich.Penal Code § 343), this Court ruled that such a total ban on protected speech could not stand because it "arbitrarily curtails one of those liberties of the individual . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Id.* at 384. The statute under challenge here deserves the same fate.

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18. *See TIME*, March 20, 1989, p. 58.

B. The Total Exclusion Of Protected Speech From An Entire Communications Medium Is Unprecedented And Unconstitutional.

1. *Neither* Pacifica *nor any other case supports § 223(b)'s flat-out ban on indecent speech.*

It comes as no surprise that the Government cannot find a single case sustaining the total exclusion from an entire communications medium of a whole category of protected speech—yet that is precisely what the Government now asks this Court to uphold. Every single decision of which Sable is aware in the areas of telephone, broadcasting, cable-TV, and print has concluded that outright bans on "indecency" violate the First Amendment, even if they are intended to safeguard the well-being of minors.[19]

The Government concedes that *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), "does not by its terms cover the telephone ban at issue here, but would require an extension to reach this case." (GB 22 n.14). That is an amazing understatement. Mere extension of *Pacifica* would not be enough; a wholesale rewrite would be required. In *Pacifica* this Court carefully noted that the FCC "has not unequivocally closed even broadcasting to [indecent] speech," 438 U.S. at 750 n.28; the only requirement was that such material be broadcast at particular hours of the day when unsupervised children were less likely to be in

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19. *See, e.g., Carlin Communications, Inc. v. Mountain States Telephone and Telegraph Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1586 (1988) (Sneed, J., for the court) ("The First Amendment does not permit a flat-out ban of indecent as opposed to obscene [telephone messages]."); *Carlin III*, 837 F.2d at 558-60 (telephone messages); *Action for Children's Television*, 852 F.2d at 1343 n.18 (broadcasting); *Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g* 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'g sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F.Supp. 1099, 1106-17 (D.Utah 1985) (cable-TV); *Cruz v. Ferre*, 755 F.2d 1415, 1418-22 (11th Cir. 1985) (cable-TV); *Butler v. Michigan*, 352 U.S. at 383-84 ("immoral, lewd, or lascivious language or descriptions" in print or audio recordings).

the listening audience. *See id.* at 755-56 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment). The Court took pains "to emphasize the narrowness of [its] holding," stressing that it had *not* decided that "this broadcast would justify a criminal prosecution." *Id.* at 750. *See Carlin III*, 837 F.2d at 560 (holding *Pacifica* is no authority for sustaining criminal prosecution under § 223(b)). As a consequence, the decision that the Government would now use to usher in a brave new world of flat-out bans on indecent speech has repeatedly been confined to its facts by this Court and others.[20]

Pacifica thus does not authorize either a blanket ban on indecent speech or criminal prosecution even of broadcasters for offering indecency. Time channeling fully serves the *only* possible legitimate government interest—providing parents with the opportunity to determine whether their children should be exposed to "indecent" speech.[21] That same interest in the telephone context is vindicated by blocking devices, scrambling mechanisms, and access codes.

Moreover, as the *Pacifica* opinion itself makes plain, cases decided in the field of broadcasting cannot readily be applied elsewhere because, as a long settled historical matter, "of all forms of communication, it is broadcasting that has received the most limited First Amendment Protection." 438 U.S. at 748. *See also id.* at 741-42 & n.17. In *Bolger*, this Court declined to apply *Pacifica* to support a ban on potentially offensive unsolicited mailings about condoms because "the special interest of the Federal Government in regulation of the broadcast media does not

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20. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983); *Carlin III*, 837 F.2d at 560.

21. While *Pacifica* also referred to an interest in protecting the adult audience from indecent speech, 438 U.S. at 748-49, this Court has since made clear that there is no government interest in barring adult access to offensive material. *Bolger*, 463 U.S. at 71-72. Contact with Sable's telephone messages is, after all, triggered by the individual, not Sable, and only by deliberately dialing a phone number known to bring into the individual's home an adult-oriented telephone message.

readily translate into a justification for regulation of other means of communication." 463 U.S. at 74.

In accord with this analysis, the Second Circuit concluded in *Carlin III* that "telephone calls made by an individual over a private line differ significantly from the public broadcast in *Pacifica.*" 837 F.2d at 560. Indeed, it has been said that the broadcast media are uniquely pervasive and invasive, "confront[ing] the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *See Pacifica,* 438 U.S. at 748. Someone listening to a radio "is constantly tuning in and out," so not even "prior warnings can[] completely protect the listener . . . from unexpected program content," *Pacifica,* 438 U.S. at 748. *See also id.* at 760 n.2 (Powell, J., joined by Blackmun, J., concurring in part and concurring in the judgment). Even those who regard that view as overdrawn must concede that contact with Sable's telephone messages is initiated by the individual, not by Sable, and only by deliberately dialing a particular sequence of numbers when the individual has made an informed decision to summon an adult telephone message into his home.

Whatever the merits of the analogy posed in *Pacifica,* in this case there is no captive audience accosted by an unsolicited and unwanted "indecent phone call." 438 U.S. at 749.[22] Therefore, the "right to be let alone" cuts sharply *against* § 223(b) and not, as the Government believes (GB 28), in its favor. "If the First Amendment 'means that a state has no business telling a man, sitting alone in his own house what books he may read or what films he may watch,' *Stanley v. Georgia,* 394 U.S. 557, 565 (1969), then

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22. In *Bolger* concerns about exposing minors to supposedly indecent sexual matter were insufficient to prohibit even *unsolicited* mailings of contraceptive pamphlets and advertisements, 463 U.S. at 72, because such mailings were not so "intrusive and uncontrollable" as to warrant a total ban. *Id.* at 74; *accord id.* at 78 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment). *A fortiori,* no ban on *outgoing* telephone calls can be justified here.

it certainly means that the state cannot censor or unreasonably burden the protected speech accessed or engaged in by adults vis-a-vis the telephone." *Fabulous Associates, Inc. v. Penn. Public Utility Comm'n,* 693 F.Supp. 332, 337 (E.D.Pa. 1988).

It is unsurprising, therefore, that until this case came along even the FCC, with respect to "both broadcasting and dial-a-porn services, . . . consistently regarded a total ban on the dissemination of indecent, but not obscene, material to be beyond the bounds permitted by *Pacifica.*" *Hearings* at 246 (letter of FCC General Counsel Diane Killory).[23] That was the position of the Executive Branch up until now—that is, up until the time that Congress obliterated five years of FCC regulatory fine-tuning by enacting § 223(b)(2)'s flat ban on indecent speech after conducting a few hours of anecdotal hearings. The original and long-standing judgment of the FCC and Justice about the unconstitutionality of banning adult message services such as Sable's was sound. Their new position, forced upon them by precipitous congressional action, is wrong. There is simply no authority for the radical suppression of protected speech which the Government now urges.

> 2. *The Government's "most enterprising minor" standard for justifying an outright ban would reduce adults to hearing and receiving only what is fit for children.*

Bereft of authority for the astonishing contraction of the First Amendment rights it seeks, the Government per-

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23. Indeed, the FCC previously stressed that *Pacifica* "affords this Commission no general prerogative to intervene in any case [involving] words similar or identical to those in *Pacifica*. . . . We intend strictly to observe the narrowness of the *Pacifica* holding." *In re Application of WGBH Educ.Found.*, 69 F.C.C.2d 1250, 1254 (1978), *quoted in Action for Children's Television*, 852 F.2d at 1336. *See also Hearings* at 255 ("any attempts to prohibit consenting adults from receiving indecent but not obscene speech would be unconstitutional") (letter of FCC General Counsel Diane Killory). The Justice Department concurred in the opinion that a flat ban on dial-a-porn would be unconstitutional. *See supra* p. 8.

severes, arguing that a total ban on indecent telephonic communication is nevertheless justified by the "substantial deference" that this Court supposedly owes to the "congressional determination" that no less restrictive alternative "guarantees that some enterprising minors will never hear the messages" offered by Sable and its competitors. (GB 35). Once again the Government asks this Court for a fundamental shift in its jurisprudence, for "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications v. Virginia,* 435 U.S. 829, 843 (1978). *See also Whitney v. California,* 274 U.S. 357, 378-79 (1927) (Brandeis, J., joined by Holmes, J., concurring).[24] In cases such as this, an independent review of the record is in order to ensure that Congress has not overstepped its bounds.

Prior to the legislation challenged here, the FCC had worked out a host of technological and regulatory means of restricting access by minors, as the Government's own recitation of the statutory background makes clear. The Commission had found the requirement of access codes and other procedures "to be both feasible and the least burdensome means of implementing the regulatory mandate" (GB 9), and had "concluded that its new regulations provided the 'most effective method currently available to restrict access by minors without unduly impairing adults who want to hear the messages.'" (GB 10). Similarly, "the Commission concluded that scrambling would be effective in reducing access to dial-a-porn by minors and could be implemented at reasonable cost." (GB 11). After extensive review, the Second Circuit approved the FCC's proposed security scheme as "a feasible and effective way to serve this compelling state interest." *Carlin III,* 837 F.2d at 555. (GB 12).

Congress did *not* reject these findings of efficacy; it simply raised the standard, lamenting that "[n]o method

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24. The Government's supposedly contrary authorities (GB 35) are inapposite because they were decided outside the special First Amendment context.

guarantees that *some enterprising minors* will *never hear* the messages." (GB 10, 35) (emphasis added). Although the "lesser measures proposed by the FCC in its rulemaking procedings" were "effective," they could not "preclud[e] access by minors *altogether*." (GB 33) (emphasis added). A legislative or administrative judgment that a flat ban on protected speech is the only means of achieving the "*absolute impossibility* of access" to adult message services by "*all* children" (GB 35) (emphasis added) is not entitled to any judicial deference because the impossible standard it sets is anathema to the First Amendment.

The standard heretofore pursued by the FCC in regulating indecent speech was one of reasonableness—was there "a reasonable risk" of exposure to children against the wishes of their parents. *See, e.g., Action for Children's Television,* 852 F.2d at 1335-36, 1341-42. This standard and the record necessary to meet it in any given case have been rigorously policed by the courts. *See id.* Moreover, this was the standard for the FCC time-channeling decision upheld in *Pacifica*—the Commission's decision that "rested entirely on a nuisance rationale," *Pacifica,* 438 U.S. at 750. Much can therefore be learned from an examination of the Government's argument that dial-a-porn is likewise an "attractive nuisance." (GB 29). For that tort doctrine has never required those who own or produce such attractions to ensure that *no* child could *ever* gain access to the nuisance under *any* circumstances. The owner of potentially dangerous property is required only to take reasonable precautions to prevent harm to children. *Prosser & Keeton on Torts* 411 (5th Ed. 1984). There is no requirement that he "make his premises 'childproof.' " *Id.* at 410-411.[25]

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25. *See, e.g., Corcoran v. Village of Libertyville,* 364 N.E.2d 467, 473 (Ill. App. 2d Dist. 1977) ("Whatever may be the status of the attractive nuisance doctrine or its relevancy to this case, the law does not impose on landowners the duty of fencing all bodies of water which are located on their property. . . . And the cases generally give consideration to the practicability and expense of fencing or guarding the source of danger.").

Yet "childproof" is the very standard which the Government now seeks to foist upon a "nuisance" which all agree is protected by the First Amendment. This argument goes too far and proves too much. The compelling state interest here is to "support[] 'parents' claim to authority in their own household,' " *Pacifica*, 438 U.S. at 749 (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)). The government's task "is not to establish itself as censor but to *assist parents* in controlling the material young children will hear." *Action for Children's Television*, 852 F.2d at 1334 (original emphasis). With its "childproof" standard, the Government exchanges the role of foster father for that of Big Brother.

Because "some enterprising minors" will be able to circumvent the technological barriers required by the FCC or to seek out friends whose parents have allowed access to dial-a-porn services from their homes, the Government insists that the state may ban such communication altogether, thereby reducing the adult population to expression that the state deems fit for children. There is no limiting principle to this argument. The "most enterprising child" standard would justify a complete ban from any medium of communication of virtually all materials that government considers inappropriate for minors.

The Government attempts to distinguish the phone message service at issue here from other communications media by linking its entire analysis to the speaker or message provider's ability to "separate the audience of children from the audience of adults at the point of commercial sale." (GB 33). According to the Government, telephone services are distinctive and deserving of special treatment because, unlike sales of books, magazines, and movie theatre tickets, there is no person sitting behind the cash register or the ticket window to check identification or otherwise determine the age of the buyer when an anonymous and unseen caller rings up dial-a-porn. This supposed limiting principle contains two independently fatal flaws.

First, there is no reason to accept the Government's dubious assumption that a minor capable of electronically bypassing his parents' telephone scrambler or illicitly obtaining a dial-a-porn access code will be unable to fake an ID, slip into an R-rated movie, or buy a copy of *Playboy* magazine.

Second, this "point of commercial sale" distinction is a pure canard because it rests on the patently fallacious assumption that differences in point-of-sale security from one medium to another correlate closely with the governmental interest being asserted—aiding parental ability to protect the morals and psyches of children. Yet it is beyond dispute that any harm to children is posed not by the act of purchasing indecent materials, but by exposure to them. *Cf. Craig v. Boren*, 429 U.S. 190, 204 (1976) (invalidating, for lack of a substantial relationship between ends and means, a law banning the purchase of beer by young males but not banning their consumption of beer once acquired, even if purchased by their same-aged female companions).[26]

Once one recognizes the uncontroversial fact that this is the nature of the harm at stake, it becomes all too clear that the rationale being used by the Government today could justify bans on an endless variety of protected speech that is "indecent," "unseemly," or "sexually suggestive." For even if one could guarantee that R-rated movie videos, sexually explicit bestsellers, cable-TV offerings, and adult magazines would never be directly sold or rented to minors, there will always be myriad secondary access opportunities—a neighbor's video library, a clandestinely circulated pornographic book, magazines "bor-

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26. A simple hypothetical clinches this point. Suppose dial-a-porn services operated by charging customers a flat monthly fee that allowed unlimited access once eligible age had been verified in an initial person-to-person encounter. Although each call to the message service would no longer constitute a "sale" or result in a separate, incremental charge to the caller's telephone account number, the exposure of children who made such non-point-of-sale calls would remain just as harmful.

rowed" from the closet of a friend's father—through which enterprising children will evade purchasing controls and gain indirect access to indecent materials. As one court recently replied to the argument, advanced by the Government here (GB 33 n.22), that even a central blocking system couldn't keep a child from hearing a message at a neighbor's home:

> This scenario, however, is no different from that where minors who are too young to buy porn magazines, still have access to the magazines purchased by their older siblings or parents; the fact that children may have indirect access to such communications provides no adequate justification for placing greater burdens on adults' access to protected speech.

Fabulous Associates, 693 F.Supp. at 339 n.14.

The "most enterprising minor" argument advanced by the Government has in essence already been rejected by this Court. *Butler v. Michigan,* 352 U.S. 380 (1957), confronted a law whose precise goal was to ensure that even the most enterprising child could never be exposed to such materials by banning even secondary transactions—loans, gifts, circulation, exhibition, or the "introduc[tion] into any family, school or place of education"—of any book, magazine, picture, audio recording or other thing containing indecent language or material. *Id.* at 381. By a vote of 9 to 0, the Court gave the back of its hand to the notion that government may "quarantine the general reading public" and "reduce the adult population . . . to reading only what is fit for children." *Id.* at 383. As Justice Frankfurter observed, purging an entire medium of protected speech "not too rugged for grown men and women in order to shield juvenile innocence . . . is to burn the house to roast the pig." *Id.*

3. *The Government's "alternative media" argument would eviscerate the First Amendment because it too contains no limiting principle.*

The Government finds "it . . . significant that § 223(b) is a restriction only on the telephone medium."

(GB 34). On the contrary, what is significant is that the Government can so breezily dismiss the complete censorship of an entire category of protected expression from what is perhaps the single most important, most widely accessible, and most frequently used channel of communication for the American people. A telephone blackout on "sexually explicit or suggestive" speech may not be excused by pointing out that "[a]dults remain free to purchase recordings containing the identical messages at book or record stores." (GB 34). *First*, this argument "is an inadequate response to the fact that [the form of expression] which the [statute] bans is protected by the First Amendment." *Schad*, 452 U.S. at 75 n.17 (rejecting argument that non-live entertainment, presumably in the form of movies, is a constitutionally adequate substitute for the constitutionally protected live nude dancing at issue).

Second, this Court has squarely and repeatedly rejected the Government's "alternative sources" argument. "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Bolger*, 463 U.S. at 69-70 n.18 (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)); *Schad*, 452 U.S. at 76-77. *See also Bolger*, 463 U.S. at 79-80 (Rehnquist, J., joined by O'Connor, J., concurring in the judgment).[27]

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27. Of course, as this Court noted in *Bolger*, "the availability of alternative means of communication is relevant to an analysis of 'time, place, and manner' restrictions." 463 U.S. at 70 n.18. Thus, the existence of "reasonable alternative avenues of communication," *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 932 (1986), in the form of alternative sites for adult movie theatres, is relevant to the constitutionality of zoning ordinances that affect the location and concentration of such businesses. *See id.; Young v. American Mini Theatres*, 427 U.S. 50, 62 (1976). Although the *Pacifica* Court did note, in upholding the FCC's power to forbid radio broadcasts of indecent material in the middle of the afternoon, that the recorded comedy routine at issue was available on "tapes and records" as well as in 'theatres and nightclubs," the Court made it clear in the same breath that a total radio ban on indecent speech was not

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Third, the Government's argument admits of no stopping point. If a blanket ban on protected speech in one medium may be upheld so long as another channel of communication remains available, then a category of expression may be booted out of one medium after another—from radio to telephones to bookstores to theatres—until only one medium remains. On the Government's rationale, the sale and distribution of indecent magazines, books and movie videos through the mails could be forbidden—on the ground that minors can easily obtain such items since customers cannot effectively be screened for age (*see* GB 34, 36)—so long as adults could purchase these things in stores. Of course, such a ban would close down subscriptions of *Playboy* and many photography magazines, eliminate trashy bestsellers and racy romance novels from the book club lists, and put an end to the mail-order business in R-rated movie video cassettes. No wonder the Court rejected an "alternative means of access" argument in *Bolger* and denied government the power to purge the mails of material unsuited for minors. Just as the "level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox," 463 U.S. at 74, so the range of messages and vocabulary accessible from the private telephone of a consenting adult cannot be

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at issue because the FCC had not closed "even broadcasting to speech of this sort" during other times of the day. 438 U.S. at 750 n.28. The *Pacifica* dictum about tapes and records can hardly be the basis for the alternative media argument advanced here. *See* GB 34. Indeed, this Court has indicated that adult theatre zoning ordinances are unconstitutional if they exclude the films at issue from the city's entire "market." *See Young*, 427 U.S. at 62; *Schad*, 452 U.S. at 71 ("The Court [in *Young*] did not imply that a municipality could ban all adult theatres"); *City of Renton*, 106 S.Ct. at 932 ("the First Amendment requires . . . that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theatre within the city"). If the Government's alternative media argument were sufficient to justify a total ban, then even the total exclusion of adult theatres from an entire city could be upheld so long as the city's residents could rent adult videos or see adult films on cable-TV channels.

limited to that which would be suitable for the public address system of a grade school cafeteria.

C. Section 223(b)(2)'s "Indecency" Standard Is Unconstitutionally Vague.

The requirement that criminal statutes provide "fair warning" of the conduct proscribed is "the first essential of due process." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). *See also Marks v. United States*, 430 U.S. 188, 195 (1977). This principle has special force where laws impose "criminal penalties" or "threaten[] to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982). In particular, the most important factor affecting the statutory clarity that the Constitution demands is whether the statute "abut[s] upon sensitive areas of basic First Amendment freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).[28] Section 223(b)(2) meets both of these tests for the most rigorous constitutional scrutiny, for it is a criminal prohibition that, beyond merely "abutting upon" the First Amendment, has the suppression of protected speech as its avowed purpose.

The key term of § 223(b)(2), "indecent," is nowhere defined in the statute, but the Government states that Congress understood the word as it was used in *Pacifica* (GB 18); *see Carlin III*, 837 F.2d at 558. Therefore, the Court is told, a commercially motivated telephone message is indecent if it " 'describes, in terms patently offensive as measured by contemporary community standards for the • • • medium, sexual or excretory activities and organs.' " (GB 18) (quoting *Pacifica*, 438 U.S. at 732). Unlike ob-

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28. In a long line of decisions, this Court has taken "special care to insist on fair warning when a statute . . . implicates First Amendment values." *Marks v. United States*, 430 U.S. 188, 196 (1977). *See also Buckley v. Valeo*, 424 U.S. 1, 40-41 (1976) ("Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area pe[illegible]eated by First Amendment interests."); *Smith v. California*, 361 [illegible] 147, 150-51 (1959).

scenity, there is no requirement that indecent language appeal to the prurient interest or lack serious literary, artistic or political value. (GB 18).

The first flaw in this definition of criminal conduct is that it was borrowed, without any reflection, from *Pacifica*, which expressly and repeatedly disavowed approval of the "indecency" standard for purposes of criminal prosecution. 438 U.S. at 750; *id.* at 739 n.13. Indeed, the plurality opinion emphasized the significance of the fact that only a "moderate" civil penalty for broadcast of indecent speech was at stake. *Id.* at 747 n.25. The Government's contrary assertion notwithstanding (GB 19 n.12), it is therefore beyond cavil that the vagueness of this definition of indecency when used in a criminal statute is not only undecided but also gravely in doubt.[29]

The second flaw in the use of the *Pacifica* indecency standard to prosecute telephone expression is that the Court expressly and emphatically limited its approval of the term to the specific broadcast medium at issue, and warned that this indecency test and analysis would be inappropriate with respect to other media of communications in other contexts. 438 U.S. at 750. *See supra* pp. 21-23.[30] Indeed, the Court stressed the unique character of the broadcast medium as the primary reason for "the narrowness" of its holding. 438 U.S. at 748-50.

The FCC admitted in *Pacifica* that defining "indecency" had theretofore been a frustrating struggle and that the term had never been authoritatively construed.[31] The Court of Appeals for the District of Columbia Circuit

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29. *Action for Children's Television*, in which the District of Columbia Circuit ruled that *Pacifica* foreclosed a vagueness challenge to the indecency ban, 852 F.2d at 1338-39, likewise involved only administrative broadcast channeling rather than criminal prosecution.

30. In quoting the *Pacifica* indecency defintion (GB 18), the Government omits the phrase in which this Court tied the issue of indecency to "contemporary community standards *for the broadcast medium.*" 438 U.S. at 732 (emphasis added).

31. Brief for Petitioner in *Pacifica* at 22.

found itself unable to pin down the term and held the FCC's ban on indecency unconstitutionally vague. *Pacifica Foundation v. FCC*, 556 F.2d 9, 16-17 (D.C.Cir. 1977). No further clarification was forthcoming in that litigation because, at the urging of the FCC,[32] this Court refused to endorse or even to address application of the indecency definition—even *within* the broadcast medium—to any circumstances other than those presented by the particular case before the Court. *See Pacifica*, 438 U.S. at 750. The upshot is that all anyone really knows about "indecency" under § 223(b)(2) is that it applies to George Carlin's "Seven Dirty Words" monologue.[33]

The *Pacifica* indecency standard—and therefore § 223 (b)(2)'s standard as well—is a chimerical thing. Its meaning flows from a "nuisance rationale under which context is all-important. The concept requires a host of variables." *Pacifica*, 438 U.S. at 750. Among those variables are the content of the message in which the allegedly indecent language is used and the nature of the audience. *Id.* at 731-32, 750. " 'The governing idea is that 'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct.' " *Id.* at 732 n.6 (quoting

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32. The FCC devoted much energy to convincing this Court that it need not pass on the constitutionality of the generic definition because the Commission had addressed only the limited question of whether the particular broadcast was indecent. *See* Brief for Petitioner at 41-48, *in FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

33. Indeed, the FCC itself was sufficiently uncertain about what it thought the term meant that for a decade it limited application of the *Pacifica* standard to material similar to the Carlin monologue. *See, e.g., Pacifica Foundation*, 95 F.C.C.2d 750, 753-61 (1983) (finding use of several of "seven dirty words" not to be indecent); *WGBH Educ.Foundation*, 69 F.C.C.2d 1250, 1251 (1978) (finding not to be indecent television broadcasts dealing with "scatology, immodesty, vulgarity, nudity, pro.anity, and sacrilege"). The Commission has since announced that it will apply a dramatically broader, but unspecified, understanding of "indecency" in regulating both broadcasts and telephone communications. *See Infinity Broadcasting Corp. of Penn.*, 3 FCC Rcd 930 (1987); *Hearings* at 211 (statement of FCC General Counsel Diane Killory).

concurring statement of FCC Commissioners Robinson and Hooks).

All of this adds up to the fact that § 223(b)(2)'s test for what constitutes criminal "indecent communication" is afflicted with two fundamental infirmities. *First,* the standard of conduct remains vague because no branch of the federal government has been willing to take responsibility for figuring it out. Congress provided no definition for the term; it simply referred all queries to *Pacifica.* But the *Pacifica* Court declined to address the Court of Appeals' ruling that the standard was impermissibly vague and declined to ferret out a definition; for the future, the FCC was directed to consider a wide variety of inherently fluctuating factors in continuing to make similarly isolated, ad hoc, context-bound judgments. For its part, the FCC shrank from the task of actually defining the term and simply shrugged, saying that "it all depends." This makes the "I know it when I see it" standard seem concrete by comparison.

A criminal prohibition violates due process if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally,* 269 U.S. at 391. Such guessing is unavoidable with respect to § 223(b)(2) because the federal government has refused to offer any guidance. Sable and its officers do not expect the government to "exercise their editorial judgment for them," *Infinity Broadcasting Corp. of Penn.,* 3 FCC Rcd 930, 932 (1987), but a clue as to what will next be deemed criminally indecent in which context would be appreciated. Indeed, the Due Process Clause requires much more than a clue. Under *Miller v. California,* obscenity may be outlawed only if the proscribed " 'hard core' sexual conduct [is] specifically defined by the regulating state law as written or construed." 413 U.S. at 27. "[S]pecific prerequisites" for what constitutes obscenity were held to be essential to "fair notice." *Id.* No less is essential when the law's target is the far wider one of all "indecency."

Second, because the statute incorporates the *Pacifica* "standard," the meaning of 223(b)(2) criminal indecency is destined to remain ad hoc, contingent, and inconsistent. For example, the Government states that the question of indecency involves no assessment of whether the speech, taken as a whole, appeals to the prurient interest or whether it has significant literary or artistic value (GB 18), yet in *Pacifica* the FCC stated that such value might prevent speech from being held indecent in some contexts, 438 U.S. at 732 nn. 5 & 6, and the Commission continues to treat such value as one of the variables, although it has refused to define the role of this factor in its multivariable indecency analysis.[34] Such conflicting signals with respect to criminal statutory commands deny fair warning and cannot be given legal effect. *United States v. Cardiff*, 344 U.S. 174, 176-77 (1952).

Even more disturbing is the contingent role of the audience in determining whether particular expression is indecent. The composition of the audience and the risk that it would include particular age groups of minors were of central importance to the FCC and the Court in *Pacifica*. The make-up of the potential audience for a given broadcast in a given community, as determined from demographic studies and statistical forecasts, continues to play a pivotal role in FCC enforcement of the ban on broadcast indecency, *see, e.g., Action for Children's Television*, 852 F.2d at 1341-42, which of course employs the same standard that is now to be applied under § 223(b)(2). Even in cases involving discrete radio broadcasts to a single local community, the FCC's findings on audience composition and the risk of exposure to minors have been rejected as "more ritual than real." *Id.* at 1341. With respect to criminal prosecution of telephone messages on a *national* network under § 223(b)(2), the complexity and uncertainty of the audience component of the indecency standard mount exponentially. If the FCC cannot anal-

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34. *See Infinity Broadcasting*, 3 FCC Rcd at 932.

yze such factors in assessing indecency to the satisfaction of the federal courts, it is absurd to demand that individual message providers do so under threat of criminal penalty. When such inherently indeterminate assessments are made the basis of regulatory policy, it is—to say the least—unfortunate. When they are made the basis of criminal prosecution, it is unconstitutional.

II. SECTION 223(b)'s PROHIBITION OF "OBSCENE" TELEPHONE COMMUNICATION LIKEWISE VIOLATES THE FREE SPEECH AND DUE PROCESS RIGHTS OF ALL WHOSE MESSAGES ARE "OBSCENE" ONLY BY THE STANDARDS OF COMMUNITIES THEY DO NOT SEEK TO REACH.

A. When It Enacted § 223(b)(1), Congress Created A Double Bind For Those Who Wish To Make Frankly Sexual Messages Available Only To Callers From Communities Where Those Messages Would Be Acceptable And Are Constitutionally Protected.

The Government's facile equation of the ban on obscene *telephone* communication with bans on transmitting obscenity by *mail, radio,* or *television* (GB 40) might make sense as to individuals or firms making *out*going obscene phone calls, since they can decide which communities to reach with which messages and can thus readily avoid sending problematic messages to places where, in accord with *Miller v. California,* 413 U.S. at 30-32, 36-37, those messages would be deemed obscene. But the Government's equation makes no sense at all as to those parties which, like Sable, do not *place* calls but merely *receive* them, and play pre-recorded messages to those who call. For, although such parties may purchase telephone lines to communicate their message, they are denied control over who may choose to call those lines. They are entirely dependent upon the local telephone companies, or "local exchange carriers" (LECs), whose lines they must use: they can *ask* LECs to offer, at the senders' own expense, existing message-blocking technology that would allow the senders to

bar designated areas of the country from accessing their lines. They can ask—but the LECs may just say no.

For example, Sable obtained a "Dial-it" telephone line from the LEC for its area, Pacific Bell, for the purpose of receiving calls from adults in Los Angeles. Despite Sable's request, Pacific Bell has not made available the option of screening out calls originating from other areas. On the contrary, even though Sable does not presently wish to communicate with persons in other states (quite apart from the existence of § 223(b)), Pacific Bell gives out-of-state callers access to Sable's message line and keeps all the revenue from this service, sharing none with Sable; Sable receives a portion of Pacific Bell's billings *only* on calls originating in-state. Federal law leaves Sable with no way to answer calls from communities that consider its messages entirely acceptable without involuntarily playing identical messages to communities where those messages might be deemed obscene. Hence the double bind: either refrain from speaking to Los Angeles listeners despite the acceptance of such messages in their community, or communicate those protected messages to them and risk prosecution in some locale where the same messages are "obscene."

While conceding that, for this reason, companies like Sable "may feel compelled to tailor their messages to the least tolerant community" (GB 21) for fear of criminal prosecution, the Government sees no constitutional infirmity in a statute that thereby forces speakers to refrain from communicating messages that are legally protected as to some areas of the country, for fear that callers from other areas of the country will trigger obscenity prosecutions. The Government simply disclaims all responsibility for this stifling of protected messages, treating it as "the inevitable consequence of the inherently national character of the telephone network" (GB 21; *see also* GB 36-38), and insisting that "[t]hose who choose to furnish potentially obscene messages in communities across the nation must be prepared to comply with the standards of each of those communities." (GB 21-22). To the Government, "Sable's

predicament is [but] the inevitable consequence of a decision to enter a business that uses a telephone network that is inherently national in reach." (GB 42).

Sable's predicament is anything *but* "inevitable." Its inability to play adult messages to consenting callers *from areas where those messages are not obscene*, for fear of later being prosecuted based on calls placed from other, less tolerant communities, has obviously been created by Congress' refusal to follow its constitutional obligation to regulate speech only in the least restrictive manner. For Congress has unquestionable power to require the LECs to make available to message senders like Sable, at the message senders' expense, the technological means of screening out long-distance calls from areas that the particular message sender chooses not to serve. This would completely satisfy the Government's asserted interest while limiting the ban on "obscene" message transmissions to those message senders who fail to utilize screening methods, made available to them at their expense, to avoid violating any locality's obscenity standard.

By *not* requiring the LECs to make such screening available and *not* limiting the federal ban contained in § 223(b)(1) to such failure-to-utilize situations, Congress deliberately chose a gratuitously sweeping prohibition. Eschewing the less restrictive alternative clearly open to it, Congress needlessly mandated that, as a condition of unhampered use of the interstate telephone system, Sable and companies like it must give up in advance the right to communicate certain protected messages to willing listeners for fear that those messages will also reach, but will later be held to violate the standards of, less tolerant communities.

B. Putting Message Senders In This Predicament Imposes An Unconstitutional Condition On Their Use of Telephone Lines For Protected Speech.

1. *Enacting § 223(b)(1) without requiring telephone companies to offer existing technologies for screening out unwanted calls abridges freedom of speech.*

Section 223(b)(1) creates constitutional problems implicating both free speech and due process because of the way it *interacts* with the surrounding legal terrain. It is instructive to compare this case with one arising out of a governmentally induced decision by an LEC to deny service to an adult message sender with respect to messages not yet adjudicated to be obscene. There, the Ninth Circuit properly held that denial to be "an unlawful prior restraint." *Carlin Communications, Inc. v. Mountain States Telephone & Telegraph Co.*, 827 F.2d 1291, 1296 (9th Cir. 1987) (Sneed, J.), *cert. denied*, 108 S. Ct. 1586 (1988); *cf. Fort Wayne Books, Inc. v. Indiana*, 57 U.S.L.W. 4180, 4184-86 (Feb. 21, 1989). What Congress did here similarly, if less obviously, operates as a prior restraint upon messages never adjudicated to be obscene—because Congress enacted § 223(b)(1) in a legal context where it left LECs legally free to expose speakers like Sable to listeners they have no wish to address. It is as though the Government said: "We will not enjoin (or induce the phone company to suppress) your protected speech, but we will compel you either to suppress it yourself or to *accompany* it—unless you convince your local telephone company to change its policy—with speech in which you do not wish to engage, which you know to be unprotected, and for which you will be federally prosecuted."[35]

Whether or not § 223(b) is thus conceptualized as creating a prior restraint, it does at the very least impose

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35. Perhaps the telephone company's policy of denying Sable screening technology is not *itself* "state action," *see Carlin Communications, supra*, 827 F.2d at 1297; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (ruling that heavily regulated public utility with a partial monopoly was not a state actor and thus did not have to accord "due process" when terminating electricity). But Sable is not challenging the telephone company's policy here; it is challenging Congress' enactment of § 223(b)'s criminal prohibition, against a legal background in which telephone companies have been left with discretion over how much of the technology available for message-blocking they may withhold and how much they may deign to make available.

a needlessly onerous burden on a message sender's privilege of using the telephone to transmit messages free of the threat of federal prosecution: it may do so only if it is willing, upon the phone company's insistence, to give up its right to transmit to certain areas of the country messages that are protected by the First Amendment as non-obscene in those areas. Special justification is needed whenever government would force someone to sacrifice a constitutional right as a condition of access to a valued public privilege. *See, e.g., Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *Sherbert v. Verner*, 374 U.S. 398 (1963). No such justification exists here. *See* II-B-2, *infra*.

Moreover, access to telephone service as a channel for communicating in the modern world is far more than a simple "privilege"; the Government's own description of telephone access as a virtually universal necessity (GB 27) shows the opposite. In contrast to government's broad power over the broadcast medium, *see supra* pp. 22-23, government has no right to maintain tight control over who may use telephones, or to force users to accept whatever risks government chooses to attach to such telephone use. Yet the Government sees no problem in confronting Sable with a take-it-or-leave-it package, under which Sable's decision to use the telephone system to transmit non-obscene adult messages necessarily exposes it, whenever the local telephone company so decrees, to being heard by people it would not choose to address, thereby subjecting itself to criminal prosecution for the content of what it is communicating.[36]

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36. Even if it were permissible for a government agency itself to put Sable to such a choice, this Court made clear in *Bell v. Burson*, 402 U.S. 535, 535-39 (1971), that government may not leave in the hands of a *private party* the power to condition access to an important public privilege—in that case to condition a driver's right to retain a valid driver's license on payment of a sum of money, as security, discretionarily set by any person suing the driver for alleged injuries. *Compare New Motor Ve-*

(Continued on following page)

Among other problems with this scheme, the First Amendment surely forbids forcing a private firm, at the discretion of other private parties, to engage in speech it would rather avoid. In *Pacific Gas and Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1 (1986), this Court invalidated a forced-speech requirement even though the conduct that made it necessary for the utility to convey a message it did not wish to convey was the utility's mailing of bills to customers—"commercial speech," at best. The invalidity of the forced-speech requirement in our case is considerably clearer, because the requirement is triggered here by the *content* of the sender's message, *contrast id.* at 31 (Rehnquist, J., joined by White and Stevens, JJ., dissenting), and because the sending of sexually explicit messages for money involves the exercise of fully protected (even if relatively less valued) speech, *not* just "commercial speech."

The criminal context of this case makes the constitutional problem even more severe than in *Pacific Gas and Electric.* Consider *Katz v. United States*, 389 U.S. 347, 352 (1967), where this Court held that, given "the vital role that the public telephone has come to play in private communication," government cannot require that those who use it expose themselves to the risk of speaking unwittingly to an "uninvited ear" and thereby subject themselves to prosecution for what they said—the risk that the "words [they] utter[] into the mouthpiece will . . . be broadcast to the world," *id.* at 352, and will thus be

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hicle Board v. Fox, 439 U.S. 96, 108-09 (1978) (holding it permissible for a state to permit a private party to trigger a *governmental inquiry*, with full procedural protections, into the activities of potential business competitors); *but see id.* at 115, 126 (Stevens, J., dissenting) (finding even this limited triggering delegation invalid on the ground that it involved a "unique and arbitrary process" that "grants private parties an exclusive right to cause harm to other private parties without even alleging that any general rule has been violated or is about to be violated" and thereby results in "the unconstitutional exercise of uncontrolled government power").

usable as evidence against them. If the Government is right in its present position, then *Katz* was wrong. For plainly the defendant in that case did not *have* to use a telephone to place illegal bets; by choosing to use a telephone, he exposed himself to the risk that government's uninvited ear would be listening in and that he might be prosecuted on the basis of what the government overheard. But this Court was surely right in *Katz* when it ruled that, given the indispensable nature of telephonic communication, this is not a risk to which government may justifiably expose those who would use the telephone to conduct their affairs.

2. This curtailment of free speech serves no legitimate purpose.

The legislative history of § 223(b) and its predecessors suggests no purpose for subjecting message senders to this double bind. There is no evidence that Congress, in passing § 223(b) without mandating that the LECs provide screening technology, ever thought about the pros and cons of subjecting the senders and recipients of adult messages to this kind of arbitrary power by private monopolists to enforce sweeping, content-based conditions on another private party's access to communication facilities.

Indeed, it is hard even to conjure a rational purpose—much less a compelling justification—for the resulting crazy-quilt pattern of censorship. Certainly the legal regime described above cannot be justified as advancing each community's interest in setting its own standards of offensiveness and prurience in the explicit description of sex to people in that community. Even if Pacific Bell, as regulated by the California Public Utilities Commission, could serve as surrogate for a Los Angeles jury, its denial of screening capacity would occur in advance of any obscenity adjudication. Moreover, it obviously could not represent any of the large number of other communities (Las Vegas, for instance) whose relatively tolerant standards Sable might hope to meet with its messages, or any of the communities at the less-tolerant end of the spectrum, which might want to exclude Sable's messages.

In this sense, § 223(b), coupled with the absence of any federal obligation on the part of LECs to provide screening for long-distance calls, seriously undermines the *Miller* principle of community control over sexually explicit materials. For when every message sender is pressured to comply with a "least tolerant community" standard, many metropolitan areas are necessarily denied access to messages that adults living there wish to receive and do ***not*** regard as obscene.[37]

C. Unless All Local Exchange Carriers Provide Geographically Based Message-Blocking, § 223(b)(1) Will Impose a Single "National" Obscenity Standard for Determining What Can Be Transmitted Over Telephone Lines, in Direct Conflict With Miller v. California.

One systemic consequence of this legal regime is that, unless and until all of the LECs choose to provide message senders with the ability to channel their telephone messages at the senders' expense to the communities they wish to address, § 223(b) will necessarily impose on many message-senders a single standard for obscenity and will thereby strip communities throughout the nation of their right to determine, within First Amendment limits, what sorts of adult material should be available to their citizens.

In *Miller v. California*, 413 U.S. 15, 30-32 (1973), this Court noted the absence of a national consensus on what appeals to the prurient interest and is patently offensive,

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37. Nor does Congress' coupling of § 223(b) with LEC freedom to deny screening bear any relation to the interest a community might claim in combatting the effects of the local production of sexually explicit materials—for example, by protecting children within that community from being exploited in the *production* of sexually explicit materials, *see New York v. Ferber*, 458 U.S. 747 (1982), or by protecting women from similar forms of exploitation, *cf. Hudnut v. American Booksellers Assoc.*, 771 F.2d 323 (7th Cir.), *aff'd*, 106 S.Ct. 1172 (1986). It has not even been suggested that interests of that sort are involved in the message-sending at stake in this case or that such concerns are in any way embodied in the statute.

and rejected the theory that "obscenity" is to be determined on any such basis: "[W]e . . . hold that obscenity is to be determined by applying 'contemporary community standards,' . . . not 'national standards'." *Id.* at 36-37 (citations omitted). Failing to take such a view would gravely undermine local control in this area. *Miller* noted that a national standard would create an intolerable risk of suppression by "necessarily impl[ying] that materials found tolerable in some places, but not under the 'national' criteria, will nevertheless be unavailable where they are acceptable." *Id.* at 32 n.13. It also rejected the effect of such an approach on less tolerant communities: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32.

In citing the *Miller* local community standard in its deliberations on § 223(b), Congress appears to have assumed that the statute would be enforced in federal district courts using each district's community standard.[38] But so long as some LECs withhold geographical targeting capacity, this sort of enforcement necessarily has the effect—as the Government admits—of imposing a "least tolerant community" standard that deprives many of the nation's communities of the right to receive materials deemed acceptable there simply because the materials are unacceptable elsewhere.

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38. The lower federal courts have uniformly interpreted anti-obscenity legislation to embody a local community standard. *See, e.g., Penthouse International, Ltd. v. McAuliffe*, 610 F.2d 1353, 1362-63 (5th Cir. 1980), *cert. dismissed*, 447 U.S. 931 (1980) (applying community standards to determine whether material is obscene in light of the Supreme Court's "reject[ion] . . . [of] a uniform national standard" in *Miller*); *United States v. Various Articles of Merchandise*, 750 F.2d 596, 599 (7th Cir. 1984) (requiring application of community standards to the determination of obscenity); *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 135 (2d Cir. 1983) (stating that "a work . . . will not be deemed obscene unless it is patently offensive according to contemporary community standards").

To be sure, one might imagine alternative "national" tests. One could adopt a "*most* tolerant community" standard, under which a message would be deemed legal under § 223(b) if acceptable in *any* community in the nation. That would have the virtue, at least, of ensuring that the statute cut off no protected speech that Sable and other message providers wish to convey to willing adult listeners. But despite the Government's attribution to Sable of a preference for such a standard (GB 42), such an approach would be all but impossible to implement and would clash with *Miller* by displacing the right of less tolerant communities to set appropriate moral standards and protect their citizens through the criminal law.

The alternative the Government evidently favors, "an average or prevalent national standard" (GB 37), would ensure the worst of both worlds. For under such a standard, the most tolerant communities would be unable to obtain many of the messages that their adult residents find acceptable and wish to hear, while the least tolerant communities would be unable to exclude messages they regard as unacceptably offensive and prurient. In any event, setting such a standard would involve making substantial judgments of morality and prudence in weighing values of federalism and free speech—policy choices that would, at the very least, have to be clearly articulated and implemented by *Congress*, not by the Judiciary: "[T]he Constitution has entrusted to Congress, and not to [any court], the task of striking [such a] balance," especially where doing so would require the Court "not merely to strike out words, but to insert words that are not now in the statute." *Marchetti v. United States*, 390 U.S. 39, 60 & n.18 (1968).[39] It is completely fanciful for the Government to

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39. To the extent that this Court were, despite these concerns, to formulate obscenity standards in a new way in accord with the Government's suggestion of what might be sensible, such a determination could not justify criminal prosecution for conduct that occurred prior to the Court's opinion on this matter. *See Marks v. United States*, 430 U.S. 188, 196 (1977) (holding that due process precludes the retroactive application of new standards for obscenity).

suggest that Congress has already made these tradeoffs; every indication is to the contrary.

CONCLUSION

For the reasons stated above, the judgment in No.88-515, upholding § 223(b)(1)'s obscenity provision, should be reversed, and the judgment in No.88-525, invalidating the indecency ban in § 223(b)(2), should be affirmed.

Respectfully submitted,

LAURENCE H. TRIBE
Counsel of Record
BRIAN STUART KOUKOUTCHOS
KENNETH J. CHESEBRO
GENE B. SPERLING
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-1767

Of Counsel:

RICHARD K. SIMON
LEE L. BLACKMAN
BETH KIRK
McDERMOTT, WILL & EMERY
2029 Century Park East
Los Angeles, CA 90067

LAWRENCE E. ABELMAN
NORMAN S. BEIER
ABELMAN FRAYNE REZAC
& SCHWAB
708 Third Avenue
New York, NY 10017

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In the Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, CROSS-APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE CROSS-APPELLANTS/APPELLEES

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DIANE S. KILLORY
General Counsel
Federal Communications Commission
Washington, D.C. 20544

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-515

SABLE COMMUNICATIONS OF CALIFORNIA, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES

No. 88-525

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, CROSS-APPELLANTS

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE CROSS-APPELLANTS/APPELLEES

In our opening brief, we argued (at 22-36) that the Court should apply the context-specific analysis of *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978), and uphold Section 223(b)'s ban on indecent commercial interstate telephone communications against Sable's facial challenge. We contended that the law is justified under the First Amendment by a distinctive combination of factors in a context similar to that presented in *Pacifica*—the accessibility of the telephone medium to children; the compelling governmental interest in preventing children (especially younger chil-

dren from hearing patently offensive sexual speech without parental supervision, especially in the privacy of the home; the reasonable congressional judgment that no lesser measure would reliably prevent children's access; and the availability of alternative sources of such speech for adults who wish to obtain it. In these circumstances, whatever the precise standard to be applied by the Court, the commercial indecency ban should be upheld. Indeed, the law meets even Sable's test (Br. 19) that the law "must be narrowly drawn and must further a sufficiently substantial government interest." *Schad* v. *Mount Ephraim,* 452 U.S. 61, 68 (1981).

We also showed in our opening brief (at 36-45) that Sable's facial constitutional attack on Section 223(b)'s ban on obscene commercial interstate telephone communications is meritless. Obscene speech may be banned because it is outside the First Amendment's protection, and the statute incorporates proper standards for defining obscenity consistent with this Court's decisions in *Miller* v. *California,* 413 U.S. 15 (1973), and its progeny. Moreover, even if "local" community standards are used to define obscenity, we argued, Section 223(b)'s legitimate ban on speech that is obscene in a particular community is not facially infirm on the ground that the same speech might not be obscene elsewhere: the statute is plainly capable of valid application, given a proper venue and choice of community standards (issues that should be raised in a particular enforcement proceeding); and, in any event, Congress may validly impose on Sable the duty to avoid transmitting to particular communities speech that is obscene in those communities.[1]

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[1] We also pointed out (Gov't Br. 43-45) that the obscenity and indecency bans are severable. Sable has now abandoned its earlier argument to the contrary. Br. 11 n.12.

A. *No. 88-525 (Indecency)*

1. Notwithstanding Sable's contrary suggestions (Br. 17, 20), the scope of "indecent" as used in Section 223(b) is not really in dispute. Congress did not use the term to refer to all speech that is "unseemly" or "altogether unbecoming" or not in conformity "with accepted standards of morality"; nor did it use the term to refer to "all 'sexually explicit or suggestive messages.' " Br. 17, quoting Gov't Br. 5.[2] Rather, as the legislative history shows (Gov't Br. 18-19), speech is not "indecent" within the meaning of Section 223(b) unless it " 'describes, in terms patently offensive as measured by contemporary community standards for the [telephone] medium, sexual or excretory activities and organs.' " *Pacifica,* 438 U.S. at 732 (quoting FCC definition).[3] Patent offensiveness (along with interstate sale of the speech for commercial purposes) is thus required before speech falls within Section 223(b)'s ambit.

In part for that reason, Sable's vagueness challenge (Br. 32-37) is without merit. First, the court in *Pacifica* upheld an administrative finding of indecency under a statute, 18 U.S.C. 1464, that likewise uses the term "indecent," where the term was construed (after the offending broadcast) to incorporate the same patent offensiveness requirement

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[2] The language quoted from our opening brief did not purport to state Congress's understanding of "indecent" but gave a description of the larger category of "dial-a-porn" at which Congress took aim in enacting the commercial indecency ban.

[3] That definition is taken from the FCC definition used in *Pacifica.* Two changes are made: a reference to the telephone medium is substituted for the FCC's reference to the broadcast medium, and the definition's incorporation of a time-of-day restriction is omitted. See Gov't Br. 19 n.12. Both changes are mandated by Congress's borrowing of the definition for Section 223(b), which covers telephone rather than broadcast communications and which imposes a ban without regard to the time of the communication.

contemplated in Section 223(b). Second, this Court's obscenity decisions in criminal cases demonstrate that the availability of criminal remedies under Section 223(b) does not render its patent offensiveness requirement unconstitutionally vague: the requirement gives speakers sufficient warning of what is proscribed. Thus, in *Miller*, the Court specifically approved state statutes that criminalized "[p]atently offensive representations or descriptions of ultimate sexual acts * * * [or] of masturbation, excretory functions, and lewd exhibition of the genitals," with patent offensiveness judged by community standards. 413 U.S. at 25.[4] In other criminal obscenity cases, this Court has consistently rejected vagueness challenges, even where the statutes at issue merely used the term "obscene" or other broad standards, as long as the standards were construed to incorporate the patent offensiveness requirement. *E.g.*, *Ward* v. *Illinois*, 431 U.S. 767 (1977); *Smith* v. *United States*, 431 U.S. 291, 308-309 (1977); *Hamling* v. *United States*, 418 U.S. 87, 113-114 (1974). For the same reasons, there is no valid vagueness objection to Section 223(b)'s patent offensiveness requirement or, therefore, to its indecency prohibition.

2. Prior to arguing that Section 223(b) is unconstitutional on its face, Sable contends (Br. 17-20) that Section 223(b)'s indecency ban suppresses a substantial amount of protected speech. That contention rests in part on mis-

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[4] In the obscenity context, two additional requirements must be met: the material must, taken as a whole, appeal to the prurient interest and have no literary, artisitic, political, or scientific value. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). Those requirements make the obscenity standard less broad than it would otherwise be, but they have no bearing on whether the patent offensiveness component of the standard, which a jury must apply in determining whether material is obscene, is unduly vague (since vagueness and overbreadth are distinct objections).

characterizations of, and unwarranted assumptions about, the scope of Section 223(b)'s indecency standard. It also rests on a misinterpretation of the standards that determine the range of Section 223(b)'s applications that the Court should consider in adjudicating Sable's facial overbreadth challenge.

As this Court has made clear, Sable may prevail on its facial challenge to Section 223(b) only if (1) the statute has no permissible application or (2) the statute is "substantially" overbroad in that the statute is invalid in a substantial portion of its applications, "realistically" determined. See, *e.g.*, *New York State Club Ass'n* v. *City of New York*, 108 S. Ct. 2225, 2233 (1988); *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 798, 801 (1984); *New York* v. *Ferber*, 458 U.S. 747, 770 (1982); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). It is beyond dispute that Section 223(b)'s indecency ban has constitutional applications (to, for example, speech that is in fact obscene), and Sable does not argue to the contrary. Sable's facial challenge therefore requires it to establish and the Court to find, more than merely as a hypothetical matter, that Section 223(b) has a substantial number, or proportion, of invalid applications.

Sable seeks to do so by attempting to focus this Court's inquiry on the speech of others not before the Court. That effort is misguided. The record in this case, together with the FCC pre-1988 administrative proceedings and the several *Carlin* decisions reviewing those proceedings, demonstrates that there are tens and perhaps hundreds of millions of calls annually to the dial-a-porn services that Congress focused on in enacting the indecency ban—telephone messages designed to arouse sexual responses. See Gov't Br. 6-7.[5] This Court's analysis of Sable's facial

[5] While Sable's "frankly sexual" messages are designed to produce sexual arousal (see Gov't Br. 23 n.15), some of its messages may not have "prurient appeal" in the sense that they appeal to "sexual

challenge should focus exclusively on whether its applications to such pornography are valid, for there is no basis on which to conclude that the other kinds of speech to which Sable points make up a substantial portion of Section 223(b)'s applications.

Thus, Sable suggests that the indecency ban applies to "unseemly" or "unbecoming" language available from "dial-a-joke" telephone services, as well as to vulgar or profane language used in "rap" music available by telephone. Br. 20. As we have explained, however, Section 223(b) does not use "indecent" to apply to all such language. The indecency ban does not apply unless the speech, in context, is patently offensive in its descriptions of sexual or excretory activities or organs. Sable suggests no reason to believe that a significant amount of telephone speech other than dial-a-porn meets that requirement.[6]

Sable also suggests that a substantial amount of commercial indecent material is received over telephone lines by computers and fax machines. Br. 20. But it is inappropriate to conclude in this facial challenge that material

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responses over and beyond those that would be characterized as normal." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. at 498. Hence, even aside from the question of literary, political, artistic, or scientific value, some of Sable's messages may not be legally obscene even though they are sexually explicit.

[6] Amici Action for Children's Television et al. (Br. 4-5, 27-28) discuss various kinds of speech—and matters that have come before the FCC—to which an indecency ban in *broadcasting* might hypothetically apply, but they give no examples at all of telephone indecency, which is all that is before this Court. Even in the broadcasting context, moreover, amici vastly overstate the scope of "indecency." The Commission has never suggested that "informational programs about serious health issues like AIDS" (Br. 5) would be found indecent because of their use of sexually explicit speech. The

received by such devices comes within Section 223(b)'s ban on communications "by means of telephone," construed in light of the congressional concern with children's access and in light of what may be a somewhat different constitutional calculus for devices other than ordinary telephones. The question whether the statute covers computers, fax machines, or "desk-top publishing," none of which are involved in Sable's telephone dial-a-porn, should be left for a future case. Moreover, even if such material is covered, there is no basis for concluding that it represents a substantial portion of the statute's applications. Nor is there reason to believe that a substantial amount of such material is both patently offensive and commercial (notably, computer bulletin boards typically are non-commercial).[7]

Accordingly, the Court should consider Sable's facial constitutional arguments only with regard to commercial indecent telephone pornography, which, as far as the records suggests, comprises virtually all of Section 223(b)'s

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Commission has found indecency only in a few instances and has emphasized that material is never indecent because of the subject matter alone. Rather, the Commission has found indecency only when the material included graphic descriptions of sexual and excretory activities and organs, was "presented in a *manner* that is patently offensive," and was broadcast at a time when there was a reasonable risk that children would listen. See *Infinity Broadcasting Corp.*, 3 F.C.C. Rcd 930, 932-933 (1987). We note, too, that the Commission has dismissed most of the indecency complaints that have been filed with it, including a number of the examples cited by amici (Br. 28 nn. 116-118).

[7] Amicus Association of Interactive Information Providers is incorrect to the extent it suggests that Section 223(b) covers all so-called "chat" or "gab" lines. Conversations on such lines are not covered by Section 223(b) if the only parties who engage in indecent speech are callers who are not doing so "for commercial purposes" (Section 223(b)). The situation would be different if the "host," who is paid by

applications. If, as we argue, the indecency ban is valid as to that category, then the ban should be upheld as a "statute whose legitimate reach dwarfs its arguably impermissible applications." *New York* v. *Ferber*, 458 U.S. at 773. If other applications of the statute, not proven on the record, may raise other constitutional problems, then " 'whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.' " *New York State Club Ass'n* v. *City of New York*, 108 S. Ct. at 2235 (quoting *Broadrick* v. *Oklahoma*, 413 U.S. at 615-616).

3. Sable's contention (Br. 21-32) that Section 223(b)'s indecency ban is unconstitutional on its face should be rejected. Congress reasonably concluded that there is no effective lesser measure, given the distinctive accessibility of the telephone medium to children, that would serve the compelling and traditional governmental interest in "prevent[ing] the general dissemination of [patently offensive sexual] speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat." *FCC* v. *Pacifica Found.*, 438 U.S. at 758 (Powell, J., concurring in part and concurring in the judgment).

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the service provider, also engaged in such speech. Of course, subsection (a) of Section 223, which is not at issue here, covers certain indecent speech by those who initiate phone calls, even if not for commercial purposes.

As we submitted in our opening brief (at 23-24 n.15), the category of live two-way commercial telephone pornography is distinct from the category of pre-recorded commercial telephone pornography that Sable sells, is the subject of litigation in another case, and should not be addressed here. As an exception to the ordinary bar on third-party standing, the overbreadth doctrine has been narrowly construed (see *City Council* v. *Taxpayers for Vincent*, 466 U.S. at 798-801) and should not be extended to apply to a distinct category of speech that may require a somewhat different analysis and is already being addressed elsewhere.

The statute therefore passes even Sable's proposed test, in that it is "narrowly drawn" to serve a "sufficiently substantial government interest" (*Schad* v. *Mount Ephraim*, 452 U.S. at 68, quoted at Sable Br. 19), let alone the less "exacting" approach suggested in *Pacifica* (see Gov't Br. 24-26). None of Sable's arguments undermines that conclusion.

a. With respect to the congressional findings that support Section 223(b), Sable does not dispute that Congress may legitimately judge indecent sexual speech to be presumptively harmful to minors or that Congress has a compelling and traditional interest in protecting minors from indecent sexual speech, especially in the privacy of the home, except as their parents may see fit to allow them access to it. See, *e.g.*, *New York* v. *Ferber*, 458 U.S. at 756-757; *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944).[8] Nor does Sable openly dispute Congress's conclusion that the problem of children's access is a substantial one. Indeed, Sable effectively acknowledges the point when it concedes (*e.g.*, Br. 22) the validity of the 1983 version of Section 223(b) and of the FCC's pre-1988 requirements of credit cards, access codes, or scrambling devices as means to screen out children's calls.[9]

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[8] Amicus San Francisco AIDS Foundation suggests that telephone pornography may have social value in encouraging "safe sex" as a substitute for sexual conduct that puts people at risk for AIDS. That suggestion would seem to apply equally to obscene speech and merely indecent speech. Moreover, even aside from the weak evidentiary foundation offered for the suggestion, it is surely legitimate for Congress to make the judgment that there are compelling competing interests in protecting children from such pornography, especially given the range of alternative means available to "eroticize safe sex."

[9] Sable's attempt to cast aspersions on the evidentiary foundation for Congress's judgment (Br. 9) is unwarranted. The congressional

Sable likewise does not directly dispute Congress's finding that the alternatives proposed by the FCC prior to 1988 would not effectively remove children from the audience for dial-a-porn. See Gov't Br. 13, 33.[10] Sable does suggest that the FCC reached a contrary conclusion (Br. 25), but that suggestion is incorrect. The FCC was pursuing the limited goal of "reducing" access by minors while preserving dial-a-porn for adults (Gov't Br. 11), and it found only that its proposed measures would be the " 'most effective method currently available' " to achieve

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judgment is supported by the FCC's administrative proceedings, by common sense (given children's access to the telephone and curiosity about sex), and by testimony before Congress. See *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 215 (1987) (testimony of U.S. Attorney Brent Ward) (reporting "literally hundreds of calls from parents of minor children who had placed calls to Carlin's New York City numbers"). Of course, there are obvious problems with obtaining reliable information about how many children call dial-a-porn numbers by scientifically validated surveys.

[10] Accordingly, Sable's suggestion (Br. 25 & n.24) that no deference is due the congressional findings is irrelevant. In fact, the Court, while conducting searching inquiries into the justifications for restrictions on speech, has regularly accorded respect to legislative and administrative judgments in the First Amendment context. See, *e.g.*, *Posadas de Puerto Rico Assocs.* v. *Tourism Co.*, 478 U.S. 328, 340-344 (1986); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 508-509 (1981) (plurality opinion); *Pacifica*, 438 U.S. at 760 (Powell, J., concurring in part and concurring in the judgment) (FCC judgment entitled to respect); *Civil Service Comm'n* v. *National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 60-62 (1973); *CBS, Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 102-103 (1973); *Ginsberg* v. *New York*, 390 U.S. at 634-643.

We note that *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), which we cited in our opening brief, did involve a First Amendment issue. See 473 U.S. at 334-335.

that deliberately compromised goal (*id.* at 10). The FCC several times acknowledged that its proposals would not make it impossible for children to gain access to dial-a-porn (see Gov't Br. 35) and never stated that its proposals were effective in achieving that unalloyed goal.

More indirectly, Sable also attacks the congressional finding by contending (Br. 26-29) that our defense of Section 223(b)'s indecency ban—as well as the congressional judgment that no lesser measures would be effective—rests on a "most enterprising minor" test. But that is a test of Sable's own devising, not ours or Congress's. Moreover, Sable is wrong in suggesting by that phrase that Section 223(b)'s commercial indecency ban is not necessary because, as Sable obliquely hints, it merely plugs the last small hole in an otherwise almost-airtight regulatory structure proposed by the Commission and endorsed by Sable. The unexpressed premise of that suggestion is incorrect.

Thus, under Sable's proposed less restrictive alternative, Sable could *either* require credit card payment *or* require an access code *or* scramble its messages—and it could choose among those options for different lines. A minor could therefore gain access to Sable's messages in any of several ways: by obtaining any person's credit card number; by obtaining any access code; or by finding a telephone with a descrambling device or, indeed, by purchasing such a device (they are inexpensive).[14] Congress could reasonably conclude based on common knowledge, as can this Court, that it hardly takes an unusually enterprising minor to be successful in each, let alone any one, of those means of gaining access to Sable's messages and, given the

[14] The beep-tone device touted by amicus Olivo, which Sable nowhere endorses, would present similar problems of relatively easy circumvention—by, for example, using any telephone without such a device. With respect to various forms of blocking at the carrier's facilities, Sable has never suggested that any such alternative would be

probability of minors' sharing of information, that it would not be at all unlikely that large numbers of minors would gain access to dial-a-porn. In short, contrary to Sable's argument, Congress, in adopting the indecency ban, was not rejecting alternatives that were just shy of perfection or that were practically "childproof"; Congress reasonably determined that the realistic consequence of not adopting the ban would have been that an appreciable number of minors would gain unsupervised access to patently offensive sexual speech. As *Pacifica* makes clear, Congress may prevent that result.

b. Sable's efforts to devalue the congressional interests at stake here are equally unavailing. Sable observes (Br. 23) that its services do not make any person a captive audience as in *Pacifica,* because "contact with Sable's telephone messages is initiated by the individual, not by Sable, and only by deliberately dialing a particular sequence of numbers when the individual has made an informed decision to summon an adult telephone message into his home." But that statement ignores the critical distinction between adults and children. When the "individual" making the call is a minor, the defense of voluntary exposure carries little if any weight in the context of patently offensive sexual speech. This Court has long held that government may constitutionally prohibit a minor's voluntary purchase of sexual material that an adult is constitutionally entitled to purchase. *Ginsberg* v. *New York, supra.*

Sable also suggests (Br. 23) that dial-a-porn does not impair privacy-based interests of parents. That is not so:

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acceptable. Moreover, customer-initiated blocking would surely leave many telephones unblocked; and there is no record basis for concluding that "reverse blocking" (in which particular lines would be blocked unless customers requested that they be *un*blocked) would be feasible for many carriers or would be effective in precluding children's access.

such interests are impaired in at least two ways. Dial-a-porn impairs " 'the sanctuary of the home' " (*Frisby* v. *Schultz*, 108 S. Ct. 2495, 2502 (1988)) by placing an attractive nuisance in the home that parents must then take affirmative steps to remove; indeed, with Sable's proposed measures, the nuisance cannot be reliably removed at all (short of removing the telephone).[12] Moreover, the availability of dial-a-porn outside the home interferes with the ability of parents to control their children's sexual education, which is the time-honored justification for statutes that require vendors to ensure that they do not sell various sexual materials to minors. See *Ginsberg* v. *New York*, *supra*.

As a practical matter, of course, parental control diminishes as minors approach the age of majority. Sable Br. 28 (noting some minors' alternative access to indecent materials). But just as that fact does not undermine the justification for banning sales of indecent material to minors (a line must be drawn, as vendors cannot judge individual minors' maturity), it does not undermine the justification for ensuring that indecent telephone messages are not accessible by unsupervised minors. To suggest otherwise is to attack the basis of *Ginsberg*. In any event, Sable's point is quite irrelevant for younger children. Children can use the telephone and gain access to dial-a-

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[12] In *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983), the Court distinguished *Pacifica's* reliance on the intrusion into the home that broadcasts represent by pointing out that mail is less "intrusive and uncontrollable." Of course, "each medium of expression presents special First Amendment problems." *Pacifica*, 438 U.S. at 748. As we explained in our opening brief, the telephone, which is physically present in the home, is more akin to broadcasting than to the mail in its intrusiveness and uncontrollability. Also, the prophylactics advertisements at issue in *Bolger* are far different from the indecent material at issue here, and the governmental interests at stake are therefore also different.

porn (*e.g.*, by punching in an access code or using a simple descrambler attached or held up to the earpiece of the telephone) long before they develop the sort of independence (and physical maturity) that might enable them to obtain indecent materials elsewhere (*e.g.*, by passing themselves off as adults).

c. Relying on *Butler* v. *Michigan*, 352 U.S. 380 (1957), Sable argues (Br. 27-32) that Section 223(b) is unconstitutional because it renders commercial indecent speech unavailable to adults by telephone and that the availability of such material by other means is constitutionally irrelevant. Those arguments misconstrue *Butler* and ignore even the "narrow tailoring" standard that Sable itself promotes.

Thus, as we explained in our opening brief (at 35-36), when written materials are at issue, the compelling governmental interests in preventing unsupervised minors' access to indecent material are effectively served by statutes that require vendors to ensure that their customers are not minors.[13] Hence, under *Butler*, a total ban on the sale of written indecent material cannot be justified. By contrast, with pre-recorded telephone messages, as with broadcasting, there is no intervening vendor at all, let alone one who can reliably separate minors and adults among the audience. See Gov't Br. 35-36. For that reason, there is no less restrictive alternative that serves the compelling governmental interests here, whereas there was in *Butler*.

Moreover, the law at issue in *Butler* was anything but narrowly tailored: it sweepingly banned all commercial and non-commercial transactions in materials, written or otherwise, that contained certain non-obscene sexual matter and left available no alternative sources of any such

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[13] Contrary to Sable's suggestion (Br. 28), the point of commercial sale is significant in the First Amendment analysis because it presents an opportunity to screen minors.

matter. Here, by contrast, the indecency ban is limited to the telephone medium and to commercial sale of that speech; and it leaves adults free to purchase indecent aural (or video) messages on tape or in other forms. Contrary to Sable's suggestion (Br. 29-31), those facts are critical to applying Sable's proposed test: they are essential to judging whether the statute is "narrowly drawn" to serve a "sufficiently substantial government interest." *Schad* v. *Mount Ephraim*, 452 U.S. at 68. Indeed, *Pacifica* specifically relied on the availability of alternative sources of indecent material in upholding the FCC ban on daytime broadcasting of the particular material at issue. 438 U.S. at 750 n.28. Of course, we do not suggest (contra, Sable Br. 31) that the availability of alternative sources of material is in itself sufficient to justify a ban in a particular medium:[14] that is only one factor in the analysis, which concentrates on the overall justification for the measure given the distinctive characteristics of the medium at issue.

d. Finally, Sable asserts (Br. 21) that these cases involve an unprecedented "total exclusion from an entire communications medium of a whole category of protected speech." Section 223(b), however, does not even ban all interstate indecent speech from the telephone medium: it permits such speech if not made for commercial purposes. Of course, while the fact that speech is sold does not take it outside the First Amendment, "[t]he selling * * * brings into the transaction a commercial feature" that the Court has consistently relied on in upholding various laws affecting speech. *Breard* v. *Alexandria*, 341 U.S. 622, 641-642 (1951) (upholding ban on door-to-door commercial soliciting); compare *Martin* v. *Struthers*, 319 U.S. 141

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[14] It is that unwarranted suggestion—and not the point that alternative sources are a relevant factor in the analysis, as the Court stated in *Pacifica*—that is rejected by the decisions cited by Sable (*e.g.*, *Bolger*, *Schad*).

(1943) (invalidating ban on non-commercial distribution of material door-to-door). See, *e.g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U.S. at 57-69; *United States* v. *Reidel*, 402 U.S. 351 (1971); see also *Splawn* v. *California*, 431 U.S. 595 (1977) (discussing significance of pandering); *Ginzburg* v. *United States*, 383 U.S. at 470 (same).

In any event, this Court has never ruled that a ban on a particular category of speech in a particular medium—if otherwise found justified under the proper standards after searching inquiry—is automatically invalid because it is a ban. As the Court said in *Taxpayers for Vincent* in explaining that "[a] distributor of leaflets has no right simply to scatter his pamphlets in the air—or to toss large quantities of paper from the window of a tall building or a low flying airplane," "[c]haracterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance." 466 U.S. at 809. And the Court said only last Term, in another case that implicated the privacy of the home, "[a] complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby* v. *Schultz*, 108 S. Ct. at 2502-2503.

Furthermore, the Court has upheld or expressed approval of broad bans on speech in particular "media." See, *e.g.*, *Taxpayers for Vincent*, *supra* (ban on all signs on public property); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490 (1981) (approving prohibition on billboards, see 466 U.S. at 807); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (sound trucks); *Breard* v. *Alexandria*, *supra* (commercial door-to-door soliciting). Although such bans typically involve time, place, or manner restrictions and are content-neutral (but not always, see *Breard*), that fact makes them more sweeping in their effect on speech than Section 223(b), which applies only to commercial indecent or obscene messages and leaves all other messages unregulated. It

would stand the First Amendment on its head to condemn Section 223(b) because it is more narrowly tailored by content, if that tailoring is properly justified. Here, as we have explained, Section 223(b)'s singling out of commercial indecent speech—which is, after all, a viewpoint-neutral category, see *Cornelius* v. *NAACP Legal Defense & Educ. Fund,* 473 U.S. 788 (1985)—is amply justified by the well-recognized unique character of sexual speech in relation to minors.

B. ***No. 88-515 (Obscenity)***

Notwithstanding that obscene speech may validly be proscribed, Sable argues (Br. 37-47) that Section 223(b)'s prohibition of obscene commercial interstate speech is invalid. Sable contends that the statute has the unconstitutional effect of subjecting it to prosecution for speech that is not obscene in Los Angeles because it lacks the ability to refrain from transmitting the same speech to another community where it might be considered obscene, thus placing an unconstitutional condition on its protected speech. Sable suggests that Congress must add to the obscenity ban a requirement that local exchange carriers offer to block calls from outside the local community (a measure that Sable has never before suggested it would find to be a satisfactory response to its concerns). Moreover, without such government-imposed blocking, Sable argues, Section 223(b) would unconstitutionally incorporate a national standard of obscenity. Sable's argument is wholly inadequate to support its facial challenge for several reasons.

First, the argument fails as a facial challenge. Even on Sable's terms, the statute is capable of valid application—for example, a prosecution in Los Angeles for violating Los Angeles obscenity standards. Any requirements concerning venue or the proper standards to

apply can and must be raised in a particular enforcement proceeding. Moreover, since no other speaker is in a different position with respect to the obscenity ban from that of Sable, there is no warrant in this case for considering any "substantial overbreadth" argument based on third parties' speech. See *Taxpayers for Vincent*, 466 U.S. at 801-802. Indeed, Sable does not rely on any such argument in its obscenity challenge. Hence, the facial challenge fails. See *New York State Club Ass'n* v. *City of New York*, 108 S. Ct. at 2233.

Second, the premise of Sable's challenge dissolves if Section 223(b) properly incorporates community standards for obscenity that do not vary from local area to local area. Sable is wrong in arguing (Br. 44-46) that the Court in *Miller* rejected the application of national standards. In fact, the Court in *Hamling* v. *United States*, *supra*, affirming a conviction based on a jury instruction that directed the jury to apply " 'standards generally held throughout this country' " (418 U.S. at 103), rejected the suggestion that *Miller*, which in fact applied a statewide standard, itself prohibited the application of national standards. 418 U.S. at 103-104. While the Court in *Hamling* concluded that the "contemporary community standard" instruction in the case before it should have directed the jurors to apply the standards of the community from which they came (*id.* at 105-106), it found that the national-standard instruction given did not make any difference to the outcome of the trial. Moreover, as we pointed out in our opening brief (at 37-38), *Hamling* stressed only that obscenity must not be judged on the basis of personal sensitivities of jurors, and neither *Hamling* nor any of this Court's other decisions has addressed the question in a setting involving a national communications technology like the telephone network or federal agency administrative enforcement. Whether some kind of broader-than-local standards would be proper and should be developed in the

present setting is therefore an open question, one that should be left for an as-applied challenge in which it might make a difference.

Third, even on the assumption that local standards must apply, Sable's "double bind" (Sable Br. 38) argument is unsupported in the record or in case law. Of course, the government may validly proscribe speech in a particular community that is obscene in that community, and even Sable concedes that it is free to contract with its local exchange carrier (Pacific Bell) to arrange for screening of out-of-area calls. Sable cites no precedent for its argument that a prohibition of proscribable conduct is rendered invalid because the government does not take the *additional* step of imposing some other requirement that a third party engage in certain conduct. Certainly the "unconstitutional condition" cases cited by Sable (Br. 41) require no such thing.[15] Moreover, Sable not only failed to join Pacific Bell in this lawsuit but has offered no record support for its claim that it cannot obtain (for a sufficient price) a service that would screen out-of-area calls. Nor has Sable suggested that it has pursued legal remedies—for example, by complaining to the FCC or to state regulatory authorities—seeking to compel Pacific Bell to provide Sable the service. In these circumstances, there is no basis for Sable's facial challenge.

Finally, it appears that the factual premise of Sable's argument is mistaken, because Sable does (or shortly will) have the ability to ensure in various ways that its local speech is not accessible elsewhere. We are informed by

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[15] Even if "special justification" were required here (Sable Br. 41), it is present: a community's legitimate interest in ridding itself of sales of obscene speech is sufficient to justify the effect on other communities in which that frankly sexual speech, while still lacking literary, political, artistic, or scientific value, might not quite be obscene.

Pacific Bell that, in February 1989, it asked all of the other local exchange carriers in the nation (as well as AT & T) to block, at their facilities, calls coming into Pacific Bell's "976" numbers. Compliance with that request is now under way. Moreover, on March 22, 1989, in a proceeding to which Sable was a party, the California Public Utility Commission approved a plan, which it expects to have in operation by mid-July, that would enable Sable to offer a purely local "900" service – that is, a service accessible (by presubscription) only within the "local access transport area," which in the case of Sable is an area surrounding Los Angeles. *In re Application of Pacific Bell,* Dec. No. 89-03-061 (Applic. No. 88-04-004) (Cal. P.U.C. Mar. 22, 1989); *PUC Approves Pacific Bell's 900 Service,* PUC News (Applic. No. 88-04-004) (Mar. 22, 1989) (news release). In these circumstances, Sable simply is not (or soon will not be) in the "double bind" that it alleges.[16]

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the district court holding Section 223(b) invalid insofar as it applies to indecent speech should be reversed and the judgment holding Section 223(b) valid insofar as it applies to obscene speech be affirmed.

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[16] There may be other means, too, by which Sable can target its messages to a local audience.

Of course, if, contrary to our submission, the Court finds that Sable's facial challenge requires resolution of any factual issues, those issues may be addressed at trial. The ruling before this Court is the denial of a preliminary injunction against Section 223(b)'s obscenity provision. That ruling is properly affirmed in any event, because in the district court Sable did not raise these factual issues or offer any support for its present contentions.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

DIANE S. KILLORY
General Counsel
Federal Communications Commission

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SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Central District of California

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION

MARK E. CHOPKO
General Counsel
UNITED STATES CATHOLIC CONFERENCE
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 659-6690

Of Counsel:
KATHERINE G. GRINCEWICH

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION

The United States Catholic Conference ("Conference") respectfully moves this Court for leave to file the appended brief as *amicus curiae* in support of the federal governmental parties in these consolidated appeals. The Acting Solicitor General of the United States has given his consent to the filing of this brief. Sable Communications of California, Inc. has refused, without explanation, thus necessitating this motion.

All active Catholic Bishops in the United States are members of the Conference, a non-profit corporation organized under the laws of the District of Columbia. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, communications, and the economy. The Conference is a frequent participant in Federal Communications Commission ("FCC") proceedings in support of the public's interest in broadcast regulation. It supported the legislation under review here.[1] When permitted by Court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States.

These appeals involve an issue of first impression for the Court—whether to extend its holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), upholding broadcast restrictions on indecent speech to novel telephone technology spreading even more insidious indecency.[2] Although the very idea that the government may regulate or ban the content of telephone communications is anathema to some, careful review of the technological form and intentions of the purveyors of the communication will reveal marked differences. The choice by Con-

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[1] In their recent statement, "Political Responsibility: Choices for the Future," p. 21 (Sept. 1987), the Bishops of the Conference's Administrative Board stated: "We support reasonable and constitutionally acceptable regulation to limit the distribution of indecent, pornographic, or sexually explicit materials through the electronic media, including the telephone, so that they are not accessible to minors."

[2] In one of its two holdings, the district court invalidated the ban on indecent speech and the FCC appealed (No. 88-525). It also upheld the ban on obscene speech and Sable Communications appealed (No. 88-515). Although this *amicus* supports both aims of the statute, 47 U.S.C. § 223(b), this presentation is limited to the issue of Congress' legislative and constitutional authority over indecent speech.

gress to ban transmission of sexually explicit monologues by the telephone comes after much debate and respects a longstanding prudential consensus that children and adolescents, and their famiiles, deserve special protection.

It is the Conference's belief that the proper resolution of this case will be assisted through consideration of both (1) the role of the Congress and the Federal Communications Commission and (2) the precise technological innovation presented by access to dial-a-porn services, a particular challenge to the regulatory flexibility inherent in broadcast authorities. Although the United States is expected to deal with the detailed legislative process and other statutory and constitutional issues, the Conference will offer its own and unique perspective on the above two issues. Thus, the Conference will not duplicate the approach of the party it supports but amplify vital constitutional and regulatory matters.

Respectfully submitted,

MARK E. CHOPKO
General Counsel
UNITED STATES CATHOLIC CONFERENCE
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 659-6690

Of Counsel:
KATHERINE G. GRINCEWICH

February 22, 1989

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-515, 88-525

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION

INTEREST OF AMICUS

All active Catholic Bishops in the United States are members of the United States Catholic Conference ("Conference"), a non-profit corporation organized under the laws of the District of Columbia. The Conference advocates and promotes the pastoral teachings of the Bishops in such diverse areas as education, family life, health care, social welfare, immigration, civil rights, communi-

cations, and the economy. The Conference is a frequent participant in Federal Communications Commission ("FCC") proceedings in support of the public's interest in broadcast regulation. It supported the legislation under consideration here. When permitted by Court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people throughout the United States.

These appeals involve an issue of first impression for the Court—whether to extend its holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), upholding broadcast restrictions on indecent speech to novel telephone technology spreading even more insidious indecency. Although the very idea that the government may regulate or ban the content of telephone communications is anathema to some, careful review of the technological forms and intentions of the purveyors of the communication will reveal marked differences. The choice by Congress to ban transmission of sexually explicit monologues by the telephone comes after much debate and respects a longstanding prudential consensus that children and adolescents, and their families, deserve special protection. Unless reversed, the district court's conclusion that such a statute is impermissible will hamper effective regulation of and expose young Americans to continued indecent speech.

SUMMARY OF ARGUMENT

In the last decade there has been a remarkable growth in new electronic technology. Americans can send and receive information in various forms and of varying content in ways not previously imaginable. We link computer terminals in our homes to others thousands of miles away, may receive over a hundred television stations on a cable or by way of satellite dish, and access an unprecedented array of "services" by our telephones. One of the main growth industries in telephone services

has been sexually explicit and suggestive, even obscene, monologues designed to arouse and excite the dialers. These "services," known as dial-a-porn, are prerecorded and "sold" to a caller for a price. Even when unavailable through local telephone outlets, they can be accessed, 24 hours a day, 7 days a week by long distance from any part of the country and constitute a large number of the telephone calls made in many areas of the country.

The technological innovation of premium services is such that they can handle many thousands of calls simultaneously. Instead of being a one-on-one dialogue communications, these services resemble small radio or television outlets for those who access them. *Carlin Communications v. Mountain States Telephone and Telegraph*, 827 F.2d 1291 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1586 (1988). According to Congressional testimony, callers frequently include adolescents or children.[1] This phenomenon has created more than a little concern among parents, educators, medical professionals, and legislators and regulators. Many various approaches have been attempted to limit this access without apparent success.[2]

The Congress and the courts have long understood the need to protect adolescents, who incompletely grasp the full consequences of their actions, from access to such material, both in print and in the media. *New York v. Ferber*, 458 U.S. 747 (1982); *FCC v. Pacifica Foundation, supra; Ginsberg v. New York*, 390 U.S. 629 (1968). Last Term in *Thompson v. Oklahoma*, 108 S.Ct. 2687

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[1] *Telephone Decency Act of 1987: Hearings on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, (hereinafter "*Telephone Decency Hearings*"), 100th Cong., 1st Sess. 11 (statement of Rep. Bliley); *Id.* at 18 (statement of Rep. Coats); 134 Cong. Rec. H1690 (daily ed. April 19, 1988) (statement of Rep. Hall).

[2] The FCC rulemakings attempting to craft effective restrictions are listed *infra* at note 16.

(1988), involving the imposition of the death penalty on juveniles, a plurality recited the myriad ways that society attempts to enforce those protections through law. Some of these, like restrictions on the right to vote, marry, or contract, respect the relative immaturity of the adolescent until such time as he or she is better able to exercise these choices. Others, like parental notification in abortion or consent for health care, operate to strengthen the fundamental and constitutionally protected role of parents in the formation, nurture, and education of their offspring. Restrictions on access to sexually explicit and suggestive material reflect both concerns.

In 1983, Congress attempted to mandate a set of controlled access to dial-a-porn that it hoped would stop receipt of such material by adolescents and children. Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 8(b), 97 Stat. 1470 (1983) (enacting 47 U.S.C. § 223(b)). In 1987 and 1988, Congress undertook a comprehensive review of dial-a-porn purveyors and responded to concerns about access by children and adolescents. Faced with evidence that regulatory attempts were failing, Congress enacted a comprehensive ban. Telephone Decency Act, 47 U.S.C. § 223(b) *as amended* (Pub. L. No. 100-297, § 6101, 102 Stat. 424 (1988)). Given Congress' historic role as a broadcast and telecommunication regulator, the legislative record, and its active consideration of the legal opinion on both sides of the issue, its solution was hardly unreasonable and entitled to deference by the courts. *Rostker v. Goldberg*, 453 U.S. 57 (1981). Because of the marked similarities between the novel dial-a-porn services and broadcast, Congress infringed no constitutional prohibitions in seeking to extend protections available to families and children in the broadcast context to dial-a-porn. *FCC v. Pacifica Foundation*, 438 U.S. at 748-50.

In invalidating the ban on indecent (but not obscene) speech, the district court did not adequately weigh the

Congressional record, the role of the Congress, or the technological facts. *Sable Communications of California v. FCC*, 692 F. Supp. 1208, 1209 (C.D.Cal. 1988), *prob. juris. noted*, 109 S.Ct. 780 (1989) (Nos. 88-515, 88-525).[3] It did not explore the precise nature of dial-a-porn and compare or contrast it to other forms of broadcast. 692 F. Supp. at 1209. It rather expressed its disapproval solely because Congress enacted a ban that prohibited access to all sexually explicit monologues by way of the telephone in order to protect adolescents and children. It likewise did not believe itself empowered to apply *FCC v. Pacifica Foundation* to this case. In so doing, the district court avoided any studied consideration of the other competing, constitutionally significant interests. Unless reversed, its judgment reopens the door to access and consequent harm to this country's youth.

ARGUMENT

I. CONGRESS' DECISION TO ELIMINATE DIAL-A-PORN FROM TELEPHONE TRANSMISSION MECHANISMS IS REASONABLE AND ENTITLED TO DEFERENCE.

A. Congress Reasonably Attempted to Regulate a Harmful Use of a New Technology.

In the last decade, consumers have been able to receive more from their telephone company than traditional telephone connections to other persons with telephones for one-on-one conversations. Consumers are able to use their telephone to call numbers, usually offered on an exchange with a 976-prefix, which trigger recorded mes-

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[3] In one of its two holdings, the district court invalidated the ban on indecent speech and the FCC appealed (No. 88-525). It also upheld the ban on obscene speech and Sable Communications appealed (No. 88-515). Although this *amicus* supports both aims of the statute, 47 U.S.C. § 223(b), this presentation is limited to the issue of Congress' legislative and constitutional authority over indecent speech.

sages on topics such as sports, weather, and health. There is no conversation; the receiver listens to the message monologue. One type of recorded message "service" offers recordings of persons, usually women, graphically describing sexual intercourse and other explicitly sexual activity, a "service" commonly known as dial-a-porn. No mere titillation, these recordings feature throaty-voiced women describing sexual activity with groups and animals, violence directed towards them (such as rape), and similar actions. *See* FCC Jurisdictional Statement, p. 5. As with other recorded message services, the same 976 number may play its recording to over 50,000 callers per hour,[4] and to over 7,900 persons at the same time.[5] The supplier of the dial-a-porn message subscribes to the telephone company's dial-it network, and specifies the price to be paid per call. The telephone company bills each caller, keeps a portion for itself, and the dial-a-porn provider receives the remainder.[6] The greater the number of calls, the more the purveyor earns.

Measured by the number of calls, dial-a-porn has been a great financial success. From its beginnings as one number on the New York Telephone Company dial-it network offered by Carlin Communications, dial-a-porn numbers offered by many companies have spread to five of the seven major telephone companies.[7] Dial-a-porn vendors have made as much as $10,000 per day.[8] The

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[4] *Carlin Communications v. FCC*, 749 F.2d 113, 114 (2d Cir. 1984) (*Carlin I*), *cert. denied*, 109 S.Ct. 305 (1988).

[5] *Carlin Communications v. FCC*, 787 F.2d 846, 850 (2d Cir. 1986) (*Carlin II*), *cert. denied*, 109 S.Ct. 305 (1988).

[6] *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 56 Rad. Reg. 2d (P&F) 49, 50 n.6 (1984); *Carlin Communications v. Mountain State Telephone & Telegraph*, 827 F.2d 1291, 1293 (9th Cir. 1987).

[7] *Telephone Decency Hearings* at 11 (statement of Rep. Bliley).

[8] 56 Rad. Reg. 2d, *supra*, at 50 n.6.

popularity of dial-a-porn numbers at times exceeded the popularity of any other dial-it message service.[9] Dial-a-porn calls constitute almost a quarter of the calls made to Bell Atlantic's 976 numbers, almost thirty percent of Pacific Telesis' 976 numbers, and fifteen percent of NYNEX's 976 numbers.[10]

As the popularity of dial-a-porn grew, so has awareness of the alarming trend of attractiveness and availability of dial-a-porn to children and adolescents. Dial-a-porn businesses have aggressively marketed their numbers to the widest possible public, using indiscriminate methods. They leaflet neighborhoods, place fliers on windshields, advertise in magazines, and place advertising cards in magazine racks.[11] This marketing strategy has paid off for dial-a-porn vendors by securing a huge immature market, which avidly calls dial-a-porn numbers. While the nature of the mechanism precludes identification of the caller as adult or child, Congress has determined from testimony delivered at hearings,[12] and information supplied by angry constituents[13] that large numbers of children call these salacious messages. Congress determined that exposure to these sexually explicit mes-

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[9] *Carlin Communications v. FCC*, 837 F.2d 546, 550 (2d Cir. 1988) (*Carlin III*); *Carlin I*, *supra* at 114-15.

[10] This information was provided to Representative Bliley by telephone companies, during the consideration of the amendment under review here. It was provided to this *amicus* by his office.

[11] 134 Cong. Rec. H1699 (daily ed. April 19, 1988) (statement of Rep. Coats); *Telephone Decency Hearings* at 100 (1987) (testimony of Dar Vander Ark, President, Michigan Decency Action Council, Inc.).

[12] *Telephone Decency Hearings* at 18 (statement of Rep. Coats); *Id.* at 14, 15 (statement of Rep. Bliley); 134 Cong. Rec. H1699 (daily ed. April 19, 1988) (statement of Rep. Hall) and H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley).

[13] *Telephone Decency Hearings* at 11 (statement of Rep. Bliley).

sages was harmful to the physical, mental, and moral well-being of children.[14]

Children's access to dial-a-porn has continued unabated since 1983, when efforts began both in Congress[15] and at the FCC[16] to restrict minors' access to dial-a-porn. In spite of these time-consuming and well-intentioned efforts, by 1987 when Congress again held hearings to study dial-a-porn, it found that child access remained a disturbing reality.[17] The reach of dial-a-porn was so troubling that at the end of the 1987 hearings, Congress launched a further study of technological methods of limiting access to dial-a-porn to adults. None were found that would preclude access by children.[18] The only viable solution in Congress' view was to amend section 223 to eliminate dial-a-porn from the telephone network.[19] Its amendment of section 223 passed by an overwhelming majority in both

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[14] 134 Cong. Rec. S4377 (daily ed. April 20, 1988) (statement of Sen. Hatch); *Telephone Decency Hearings* at 15 (statement of Rep. Nielson).

[15] Pub. L. No. 98-214, § 8(b), 97 Stat. 1470 (1983) (enacting 47 U.S.C. § 223(b)).

[16] *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 FCC Rcd 2714 (1987); *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order*, 50 Fed. Reg. 42699 (1985); *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 49 Fed. Reg. 24996 (1984).

[17] *Telephone Decency Hearings* at 28 (statement of Rep. Rinaldo); *Id.* at 12, 13 (statement of Rep. Bliley); *Id.* at 131 (testimony of William Swindell, President, Citizens for Decency Through Law).

[18] 134 Cong. Rec. H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley).

[19] 134 Cong. Rec. H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley); H1690 (daily ed. April 19, 1988) (statement of Rep. Hall); S4377 (daily ed. April 20, 1988) (statement of Sen. Hatch).

houses of Congress. The Senate passed the amendment by a vote of 88-0. 133 Cong. Rec. S17048 (daily ed. Dec. 2, 1987). The House passed the amendment by 380-32. 134 Cong. Rec. H1702-H1703 (daily ed. April 19, 1988). Pub. L. No. 100-297, § 6101, 102 Stat. 424 (1988).

B. Restriction of Dial-A-Porn Respects the Immaturity of Children and Strengthens Their Parents' Roles.

This Court always has taken special care to recognize and support legislative choices that safeguard the mental, physical and moral well-being of children. In a line of cases the Court has upheld, against constitutional challenge, restrictions placed on juveniles to protect their welfare from harm at the hands of adults. *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (broadcast indecency); *Ginsberg v. New York*, 390 U.S. 629 (1968) (adult magazines); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (labor). Only last Term, the Court expounded upon the necessity for society to accommodate a basic distinction between adults and children. *Thompson v. Oklahoma*, 108 S.Ct. 2687 (1988) (plurality). This Court rested its holding in *Thompson*, in large part, on the belief that legislators should expressly reconsider the capacity of juveniles to understand their crimes and be punished by death as would adults. The plurality recognized that minors have only a reduced capacity to appreciate the consequences of their actions and to weigh the relative values of immediate gratification and approval against long-term harm.

Congress' judgment that minors should be protected from the effects of salacious material available to them by dialing the dial-it number is consistent with the Court's judgment as to minor's responsibility in *Thompson*. *See id.* at 2698-2699. Even in that case, where the end result of the minor's actions was a sadistic murder, the plurality acknowledged that a minor's moral and

intellectual development is incomplete and rudimentary. It is appropriate that society recognizes these inherent limitations by attaching a lesser level of culpability to a minor's actions so that a sixteen-year-old cannot be required legally to weigh and balance the harm which may come to him or her as a result of committing a serious crime. *Id.* at 2692-2693 and n.23. If the legislature cannot place that burden on even older minors who commit violent crimes, surely it is reasonable for Congress to judge that adolescents and the very young, who necessarily understand the workings of a telephone, cannot be left to weigh for themselves whether to risk psychological harm by dialing a dial-a-porn number.

Although laws have operated in the sensitive area of constitutionally protected rights, this Court has upheld legislation "aimed at protecting the physical and emotional well-being of youth." *New York v. Ferber*, 468 U.S. at 757. In *Ferber*, New York state made its legislative determination that even non-obscene (as defined by *Miller v. California*, 413 U.S. 15 (1973)) pornographic materials using children as subjects is harmful to the physiological, emotional and mental health of children. The Court held that the determination "easily passes muster under the First Amendment." *New York v. Ferber*, 458 U.S. at 758. Even when the ability of adults to sell erotic, non-obscene print material is affected, this Court has approved legislation prohibiting such sales to minors. *Ginsberg v. New York, supra.* The legislative judgment that exposure to non-obscene, but pornographic materials "[impairs] the ethical and moral development of our youth and is a clear and present danger to the people of the state" was held to be a rational and sustainable means of "safeguarding such minors from harm." *Id.* at 641.

The Court sustained that legislative judgment even though it expressed doubt that the legislature's finding of harm "expresses an accepted scientific fact." *Id.* at

641. It was enough that a legislature reasonably could determine that "minors' reading and seeing sex material" is "harmful." *Id.* Legislators need not postpone action until they amass scientifically certain data on which to base legislation.[20] Congress could not, and need not, have done so in the case of dial-a-porn. It was sufficient that the Congress received and considered evidence of harm to children caused by listening to dial-a-porn.[21] *Cf. Ginsberg*, 390 U.S. at 641. Given the nature of the sexually explicit service and the consequent harm to children, the failure of alternative measures to stop the harm, and the role of the Congress in protecting children, Congress acted reasonably in enacting a dial-a-porn ban.

Of equal importance in understanding the Congressional action is a desire to protect the fundamental interest of parents in inculcating the values of their children. *Telephone Decency Hearings* at 1 (statement of Rep. Markey). This Court has found the "natural duty of the parent" to educate his or her children to be part of the fourteenth amendment liberty interest in marriage, establishing a home, and raising children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923). Parental nurture and direction of children is not just a "right" but a "high duty." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *see Prince v. Massachusetts*, 321 U.S. at 166. In *Ginsberg v. New York*, 390 U.S. at 639, this Court stated that it:

> has consistently recognized that the parents' claim to authority in their own household is basic in the structure of our society. [quotation from *Prince v. Massachusetts* omitted]. The legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled

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[20] *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911).

[21] Certainly the record in this case supports a finding that harm follows from exposure to explicit material. FCC Jurisdictional Statement at 21, n.14.

> to the support of laws designed to aid discharge of that responsibility.

The "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). The legislation under review here precisely and reasonably supports that tradition.

II. THE CONGRESSIONAL JUDGMENT TO BAN DIAL-A-PORN, AN EXERCISE OF TRADITIONAL BROADCAST REGULATORY AUTHORITY, IS CONSISTENT WITH THE FIRST AMENDMENT.

The Court has long recognized that each medium of expression presents special first amendment problems. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-503 (1952). The dial-it transmission mechanism of pornography presents such a special problem. For purposes of first amendment analysis, the critical factor is the similarity to regulated broadcasting (radio and television) exhibited by the technology that distinguishes it from forms of communication that may not be subject to these same restrictions. It is still, however, a case of first impression and one that implicates the extent to which Congress can expand or contract its traditional role to coincide with technological innovations. Certainly it (and the FCC) must possess the flexibility to account for these changes. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). When also considered in light of the record of harm to children caused by exposure to these messages (note 21, *supra*), a limited extension of the reasoning of *FCC v. Pacifica Foundation* to dial-a-porn transmitted over dial-it services is entirely appropriate and constitutional.

In *FCC v. Pacifica Foundation*, the FCC prohibited broadcast indecency at times when children were reasonably likely to be in the audience. The Court determined that the attributes of intrusiveness, pervasiveness, and

unique accessibility to children made over-the-air radio and television broadcasting a transmission medium where offensive expression could appropriately be restricted "at its source." 438 U.S. at 748-49. The Court defined indecency as patently offensive words dealing with sex and excretion, and determined that such utterances, while not absolutely outside the scope of first amendment protection, are protected only in certain contexts. *Id.* at 745-748. Considering the compelling governmental interest in protecting children from such language and in protecting parents' claim to authority in their household (*id.* at 748-50), the Court affirmed that the broadcast of indecency when children are reasonably likely to be exposed to it, may be substantially regulated without fear of constitutional infringement. The Court noted approvingly that unregulated sources, bookstores and movie theaters, may be obliged to screen children and adolescents from prospective buyers and audiences and therefore avoid restricting indecent material at its source. *Id.* at 749. The Court stated, however, that its holding was narrow and reflected the special nature of broadcast media and the prospective audience. *Id.* at 750. *See Bolger v. Youngs Drug Products*, 463 U.S. 60 (1983).

A. The Exercise of Broadcast Regulation Over Sexually Explicit Monologues is Constitutional.

The *Pacifica* holding is not on all fours with the instant case. The telephone technology is normally subject to commercial but not content regulation. Indeed the expectation of privacy in such conversations is great and subject to violation at the instance of the government only in the most narrow and compelling circumstances. *E.g., Katz v. United States*, 389 U.S. 347 (1967) (requiring search warrant for telephone conversation interception). Similarly, the possession of even obscene material in one's home, which can be banned in the mails and subject to other restrictions, is given constitutional protection. *Compare Stanley v. Georgia*, 394 U.S. 557

(1969) *with United States v. Reidel*, 402 U.S. 351 (1971). An approach to content-based restrictions on one's telephone, under this Court's jurisprudence, must be careful and tailored to achieve compelling interests. If the instant case were solely about a ban on privately initiated and received adult conversation, on a one-to-one basis, like ordinary dialogue communications, it would present a difficult situation, absent some illegality. That is not this case, which involves widely disseminated, sexually explicit monologues, available to children.

In several important respects, telephone dial-a-porn offered on a dial-it network resembles the broadcasting of indecency by radio or television. Like broadcasting, the telephone service is available by purchase of a receiver. Like broadcast licensees, telephone service providers are licensed to use the public airwaves to provide service. In fact, telephone service has "established a uniquely pervasive presence in the lives of all Americans," (*cf. FCC v. Pacifica Foundation*, 438 U.S. at 748), to an even *greater* extent than broadcasting. Telephones are available in 93.6 percent of all American households. FCC News Release, FCC No. 1206 (Jan. 13, 1989). Telephones are considered a necessity for Americans by Congress and its expert telecommunications agency, the FCC. *See* 47 U.S.C. § 1. Subsidies are available to persons who cannot afford telephones to enable them to acquire a telephone. *Access Charges (Lifeline Assistance Adoption)*, 59 Rad. Reg. 2d (P&F) 634, 638 (1985); *see* H. Res. 351, 100th Cong., 2d Sess., 134 Cong. Rec. H9671 (1988). Telephones, then, are pervasive to a greater degree than are televisions or radios. Indeed, their presence in households is actively encouraged by the government, in contrast to radio and television.

Another significant broadcast-type feature of dial-a-porn is that it is truly a *broad-based* transmission—over 7,900 people may listen simuitaneously to one message. *Carlin II*, 787 F.2d at 850. Indeed mass access is how

revenue is apparently generated. The more people who may access this "service," the greater the return to the purveyor. Like broadcast outlets, dial-it services are widely and aggressively advertised. The marked similarity to broadcasting was noted by the Ninth Circuit. "Under these circumstances the telephone is serving as a medium by which Carlin broadcasts its messages. The phone company resembles less a common carrier than it does a small radio station." *Carlin Communications v. Mountain State Telephone and Telegraph Company*, 827 F.2d at 1294.

Finally, measured by the FCC definition of broadcasting, dial-a-porn could and should be classified as broadcasting. The FCC defines as broadcasting: technologies that transmit signals that the sender intends to be received by the general public, and that is receivable without special equipment (aside from the receiver) or establishment of a subscription arrangement (as is necessary for access to cable television), or both. *Report and Order Subscription Video*, 2 FCC Rcd. 1001 (1987), *aff'd, National Association of Better Broadcasting v. FCC*, 849 F.2d 665 (D.C. Cir. 1988). Plainly the sender intends that the public access its monologues, as discussed above. No prior subscription arrangement is required, only a telephone. Thus it is within the FCC definition of broadcasting.

Some argue that the application of broadcasting rules is inapposite because dial-a-porn could be "managed." Sable Communications Motion to Dismiss or Affirm In Part, at 6. Under the previous version of section 223, transmission of dial-a-porn was permitted if a blocking technology was employed to attempt to prevent access to persons under 18. 47 U.S.C. § 223(b), Pub. L. No. 98-214, § 8(b) (1983). The blocking mechanism feature arguably was similar to the lockbox mechanism available for cable decoders, that allows parents to lock out access by their children from unsupervised viewing. In this

way some would argue that dial-a-porn could not be deemed "uniquely accessible to children," and not subject to the rationale of *FCC v. Pacifica Foundation*. Thus, it is argued that dial-a-porn is like "cable television," which some courts have distinguished from the broadcast outlets for purposes of regulation.[22] This Court has not addressed the issue and its merits need not be here. To the extent this Court chooses to examine the matter, further analysis of the analogy yields that it is inapposite to the instant case: dial-a-porn is distinguishable and subject to regulation.

The availability of cable technology does not automatically bring indecent material into the home. Cable does not intrude on the home; it must be invited. Cable signals are not available merely by purchasing a television. A subscription agreement must be made between the cable operator and subscriber before signals may be received, and the agreement must be renewed by monthly payments to the cable operator. *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1167-69 (D. Utah 1982). Further, channels which offer "adult-oriented" material may only be obtained by payment of an additional fee and the making of an additional contract by an adult. "Parents decide whether to select supplementary

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[22] Lower courts have distinguished the transmitting mechanism of cable television from broadcasting for the purpose of determining if indecency constitutionally may be prohibited, and have held that, *in that context*, indecent speech is entitled to greater first amendment protection. *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *HBO v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982). The two characteristics of broadcasting relevant to granting indecency lesser first amendment protection when broadcast—pervasiveness and unique accessibility to children—were not found in the cable medium. *Cruz v. Ferre*, 755 F.2d at 1420-21; *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. at 1167-69. This *amicus* takes no position on the merits of these conclusions which are, in any event, not material to the disposition of the instant case.

programming services such as HBO." *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985). Lockboxes are available free of charge to a cable subscriber. *Id.* at 1421. That the burden is on the subscriber to install a lockbox to block certain easily identifiable channels is not unreasonable, given that the subscriber himself "invited" those channels into his home in the first place.

On the other hand, while cable and particular selections must be chosen before a home is given access and the choice is subject to monthly renewal, dial-a-porn is available to a home entirely without any affirmative action on the part of the telephone customer. Unlike cable, a telephone customer cannot choose from a menu of programming selections; one simply acquires a mechanism (the telephone) capable of receiving all available messages. Congress, accordingly, found that the "customer requested blocking of telephone . . . approach was deficient [because] [i]t placed the onus for preventing access to dial-a-porn on the telephone subscriber." 134 Cong. Rec. H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley).

For the foregoing reasons, in this novel case dealing with regulation of a new technology, this Court should decide that dial-it services are closer to regulated broadcast outlets than they are to traditionally unregulated common carriers or other media. The technological features of dial-it services intend to reach a mass audience, available every moment of every day. Telephones are pervasive, the services offered are intrusive and uninvited, and every child learns at an early age to use a telephone, if only to be able to dial his or her home or an emergency number. These factors taken together indicate that the Court's holding in *FCC v. Pacifica Foundation* applies here. For the reasons offered in *Pacifica*, the extension of regulatory authority to the dial-it technology to ban dial-a-porn is constitutional.

B. Congressional Consideration of Constitutional Implications of Regulatory Alternatives Was Reasoned and Entitled to Deference.

Telephone services do not distinguish the age of the caller, but only record that a call was made. Thus to be available to adults, dial-a-porn must necessarily be available to children. *Cf. Pacifica*, 438 U.S. at 758-59 (Powell, J., concurring in part). Congress in fact determined that no blocking mechanism, including a customer premises "lock-box," was technologically or constitutionally feasible in the dial-a-porn context:

> Mr. Speaker, I supported the initial effort to provide conferees with the latitude necessary to arrive at a content-neutral, technological solution. After 4 months of negotiations between the various staffs and groups concerned with this issue, it became clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material.

134 Cong. Rec. H1691 (daily ed. April 19, 1988) (statement of Rep. Bliley).

The ineffectiveness of the proffered technical "fix" is very important when the Court weighs the aggressive marketing of the services [23] and the harm that could occur to children.[24] After-the-fact action by parents cannot undo the harm or limit its implications for the future. As the Court recognized in *FCC v. Pacifica Foundation*, turning off the message after it is heard is too late—

---

[23] Leafletting and other means of marketing are readily available to adolescents. Because they are not mature or responsible enough to consider the implications, adolescents have exhibited a certain ingenuity in seeking access to dial-a-porn "services." *Cf. Ginsberg v. New York*, 390 U.S. at 649-50 (Stewart, J., concurring). First amendment protections presuppose the capacity to choose responsibly. *Id.* Because the service is available anywhere, anytime, the ability of a parent to monitor choices and access is difficult.

[24] *See, e.g.*, note 21, *supra*.

a factor that weighed heavily in the Court's treatment of that case. 438 U.S. at 748-49.[25] Given the longstanding legislative role in reviewing and enacting measures designed both to protect children and enhance the parental role in formation and education, the statutory ban was not only warranted but the only choice available to preclude the adverse consequences of dial-a-porn to children.

Congress' judgment that the risk of serious harm to children from access to dial-a-porn was so great that the dial-it mechanism should not carry these salacious messages was made after deliberately weighing the constitutionality of the measure. In its 1987 hearings, it heard discussions of the applicability of *Pacifica* and other relevant decisions to its proposed action. *Telephone Decency Hearings* at 29-30, 86-89, 114, 131, 216-17, 229. The texts of some cases were even included in the record. *Id.* at 135-185. The principal sponsor, Representative Bliley, specifically announced that the measure was the result of deliberations that "take into consideration Supreme Court decisions with regard to obscene and indecent speech." 134 Cong. Rec. H1691 (daily ed. April 19, 1988). Legal memoranda supporting and questioning the measure's constitutionality were included in the record. 134 Cong. Rec. S4378 (daily ed. April 20, 1988) (supporting); *Telephone Decency Hearings* at 70 (supporting); *id.* at 32 (questioning).

Where Congress specifically considers the constitutionality of a legislative measure, finds it constitutional, and enacts it, that finding is entitled to great weight. *Bowen*

---

[25] Justice Stevens' majority opinion quite brusquely dismisses the point: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place." *FCC v. Pacifica Foundation*, 438 U.S. at 748-49 (footnote omitted).

v. Kendrick, 108 S.Ct. 2562, 2578-79 (1988); *Rostker v. Goldberg*, 453 U.S. at 64. This deference has its roots in constitutional separation of powers. *Cf. Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947). It is the task of the legislative branch to examine the evidence, reconcile differences, evaluate alternatives, and propose solutions. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819). It is not the province of the judiciary to frustrate the legislative will because the law "may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." *Otis v. Parker*, 187 U.S. 606, 608 (1903); B. Cardozo, *The Nature of the Judicial Process* 141 (1921). In the instant case, that kind of legislative judgment is subrogated by the district court. This Court should adhere to the views expressed in *Columbia Broadcasting System v. Democratic National Committee*, "that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem." 412 U.S. 94, 103 (1973). In a close case—and this is one—in which the application of law is to a novel technology and in which the consequences of a wrong choice may be devastating to children and to the protected interests of their parents, no judgment of unconstitutionality should be possible.

CONCLUSION

For the foregoing reasons, the judgment of the district court invalidating the statutory ban on access to indecent speech through dial-a-porn telephone service should be reversed.

Respectfully submitted,

MARK E. CHOPKO
General Counsel
UNITED STATES CATHOLIC CONFERENCE
1312 Massachusetts Ave., N.W.
Washington, D.C. 20005
(202) 659-6690

Of Counsel:
KATHERINE G. GRINCEWICH

February 22, 1989

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 88-515 and 88-525

In The

Supreme Court of the United States

October Term, 1988

No. 88-515

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,

Appellant,

vs.

FEDERAL COMMUNICATIONS COMMISSION and RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES,

Appellees.

No. 88-525

FEDERAL COMMUNICATIONS COMMISSION and RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES,

Appellants,

vs.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,

Appellee.

On Appeal From The United States District Court For The Central District Of California

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES AND BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC.

PEGGY M. COLEMAN
P.O. Drawer 2440
107 Parkgate Drive
Tupelo, Mississippi 38803
(601) 844-5036

Counsel of Record
For Amicus Curiae

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF THE FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

American Family Association, Inc. (AFA), Moving Party herein, respectfully moves this Honorable Court for an order granting leave to file the attached Brief Amicus Curiae. AFA has requested and received permission from Appellants by their attorney, Mr. William C. Bryson, Esq., but have received no response from Appellee, Sable Communications of California, Inc., by its Attorney, Mr. Richard K. Simon, Esq.

The attached Brief supports the position of the Appellants in this case. The issue before this Court concerning the viability of the indecency standard to telephone messages will significantly affect the position of Amicus as it seeks

to participate in the enforcement process before the Federal Communications Commission as it concerns telephone and broadcast material.

INTEREST OF AMICUS CURIAE

American Family Association, Inc. is a non-profit corporation, incorporated in Mississippi in 1977 under its original name of National Federation for Decency, Inc. (NFD). AFA continues to operate as a leader of citizen and church participation to promote traditional family values through the media. AFA has members in all 50 states; over 480 chapters of local citizens; and over 360,000 subscribers to its newsletter, AFA Journal.

AFA has continually called for legal

action against providers of indecent and obscene telephone messages. It has attempted to encourage legal sanctions against dial-a-porn providers and economic sanctions against those businesses that facilitate the dissemination of the messages.

AFA has local chapters all across the country which seek to have the dial-a-porn laws enforced. Such chapters maintain their own structure, but they seek advice from AFA regarding legal precedents in their states and other jurisdictions where legal issues are decided that affect local action. AFA believes that the enforcement of civil and criminal laws against indecent and obscene material is essential to reducing the flow of such illegal material and mitigating its impact on the family.

AFA is constantly requested by local governments and individuals for advice and guidance on methods to enforce and improve existing laws regarding the distribution of indecent and obscene material.

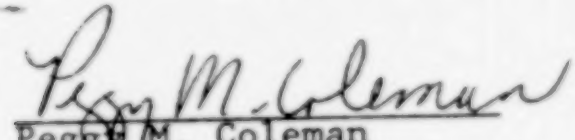
Serious efforts have been under way to protect children through the regulation of indecent and obscene dial-a-porn messages since 1983. In the interest of continuing to inform citizens regarding their ability to protect themselves from indecent and obscene dial-a-porn messages this action is most important to the inquiry. The parties have extensively written comprehensive arguments and AFA will not repeat them. Rather, AFA will highlight certain concepts it wishes the Court to consider.

The ability of AFA to call for such

sanctions against dial-a-porn providers has been fundamentally affected by the court's ruling. Amicus and the citizens they represent would be severely harmed by affirming the District Court for the Central District of California and the Ninth Circuit finding with respect to the constitutionality of the statute prohibiting indecent telephone messages.

Therefore, AFA respectfully requests this Honorable Court to grant leave to file the attached Brief Amicus Curiae in this important case and to affirm in part and reverse in part the decisions of the court below.

Respectfully submitted,



Peggy M. Coleman
Attorney for AFA

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SUMMARY OF ARGUMENT

I. THE FEDERAL STATUTE PROHIBITING OBSCENE MATERIAL TRANSMITTED BY TELEPHONE IS NOT FACIALLY UNCONSTITUTIONAL

The Congress has the authority to prosecute the interstate dissemination of obscene material. The use of interstate telephone facilities to disseminate obscene material is no different from using the United States mail system or the federal highway system. Dial-a-porn providers are using a means of interstate commerce to transmit obscene material.

II. THE PROHIBITION AGAINST THE TRANSMISSION OF INDECENT TELEPHONE MESSAGES IS NOT FACIALLY UNCONSTITUTIONAL

This Court has historically recognized the government's ability to

regulate indecent, non-obscene material. The indecency concept, as recognized in broadcasting regulation, is applicable to dial-a-porn services. The societal interests and technological parameters involving both broadcasters and dial-a-porn providers are significantly similar. Consequently, the indecency concept is equally applicable.

LAW AND ARGUMENT

I. THE FEDERAL STATUTE PROHIBITING OBSCENE MATERIAL TRANSMITTED BY TELEPHONE IS NOT FACIALLY UNCONSTITUTIONAL

A. The Federal Dial-A-Porn Statute Does Not Create An Impermissible Obscenity Test

Title 47 U.S.C. §223(b) prohibits the transmission of recorded or live obscene telephone messages. Appellees have maintained that this statute unconstitutionally prescribes a national obscenity standard. This argument was rejected by the court below and has been consistently rejected by previous federal courts. As the basis for their argument Appellees rely on language in Miller v California, 413 U.S. 15, 32 (1973), in which the Court stated, "It is neither realistic nor constitutionally sound to

read the First Amendment as requiring the people of Maine or Mississippi to accept public depiction of conduct found tolerable in Las Vegas, or New York City." The application of a federal statute to an obscene transmission presents the same considerations of community standards as does any other federal obscenity statute. In Hamling v United States, 418 U.S. 87, 106 (1974), the Court stated:

> The fact that distributors of allegedly obscene material may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no

> constitutional impediment to a similar rule for federal prosecutions.

See also, Smith v United States, 431 U.S. 291, 302 (1977); United States v Orito, 413 U.S. 139 (1973); and United States v 12 200-ft Reels of Film, 413 U.S. 123 (1973).

Clearly 47 U.S.C. §223(b) does not create a national standard for obscenity. The same concept of community standards set forth by the Hamling Court are applicable to the statute now before this Court. If Appellee's arguments were accepted, it would effectively eliminate any federal regulation of obscene material through the telephone or otherwise.

Individuals or corporations which are in the business of selling sexually explicit material, whether in the form of

magazines, films or telephone messages, have been given sufficient notice of the law and its potential for variation as applied in the several states.

II. THE PROHIBITION AGAINST THE TRANSMISSION OF INDECENT TELEPHONE MESSAGES IS NOT FACIALLY UNCONSTITUTIONAL

A. The Indecency Standard Is A Legally Recognized Standard

Title 47 U.S.C. §223(b) prohibits the transmission of indecent dial-a-porn messages. This Court first examined the indecency standard in Pacifica Foundation v Federal Communications Commission, 438 U.S. 726 (1978). The ultimate ruling in Pacifica was that the FCC had the power to regulate "indecent" broadcasts and that the government's power in this context goes beyond the proscription of the obscene. In discussing the indecency concept as applied to the broadcast medium, the Court stated that "the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language

need not be the same in every context." 438 U.S. at 746-47.

The Court offered two primary reasons for its decision. First: "[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of the intruder." 438 U.S. at 748. Secondly, "broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." 438 U.S. at 749.

The Court also recognized that the FCC's development of the indecency concept rested on a nuisance rationale. Therefore the indecency concept involves the recognition of several variables. Time of day has always been a pivotal consideration in the indecency concept. 438 U.S. at 750. In addition, the Court has stated that the composition of the audience is a factor to be examined in determining whether certain material is indecent. 438 U.S. at 750. It is important to note that material that may be found to be indecent at 3 o'clock in the afternoon may not be indecent at 3 o'clock in the morning. Consequently, indecency, as a concept has a built-in flexibility that is not found in the obscenity concept.

The Court rejected the contention

that its ruling would "reduce adults to hearing only what is fit for children", contrary to the principles set forth in Butler v Michigan, 352 U.S. 380 (1957). The Pacifica Court found that adults could hear this material through other mediums of communications thus making such regulation appropriate.

B. The Indecency Standard Is Equally Applicable to Dial-A-Porn Messages

In finding that the broadcast medium was entitled to a lesser level of First Amendment protection, the Court listed two primary reasons for the restrictions: the pervasiveness of the medium and the accessibility to children. 438 U.S. at 748-49. These criteria are equally applicable to the dial-a-porn providers.

First, the dial-a-porn providers have transformed the telephone into a broadcasting device. Dial-a-porn services do not create or facilitate a situation in which one adult is calling another adult to engage in spontaneous conversation.

In Carlin Communications, Inc. v Federal Communications Commission, 749

F.2d 113, 114 (2d Cir. 1984), the court found:

> Carlin Communications, Inc. provides a telephone "service," colloquially called "dial-a-porn," to local and long distance callers at ordinary rates. The callers hear prerecorded messages, which change several times daily as in the case of weather or sports results, describing actual or simulated sexual activity apparently in explicit terms. A dial-it service can receive up to 50,000 calls per hour to an individual number, and, rather incredibly 800,000 calls per day were made to dial-a-porn in May, 1983; 180,000,000 calls in the year ending February, 1984.

In Carlin Communications, Inc. v Mountain States Telephone and Telegraph Co., 827 F.2d 1291 (9th Cir. 1987), the court stated that "[t]he technology of that [976] network differs fundamentally from that of basic phone service. As pointed out above, individuals do not

speak to each other on the 976 lines. Instead, 'over 7,900 callers can be connected simultaneously to the same recorded message.' Carlin Communication, Inc. v FCC, 787 F.2d 846, 850 (2d Cir. 1986). Under these circumstances the telephone company resembles less a common carrier than it does a small radio station." 827 F.2d at 1294. Consequently, the court recognized that because the telephone was not being used as traditional common carrier, the concepts of traditional common carrier law did not apply.

In enacting the Telephone Decency Act, Congress, too, recognized that the traditional concepts of telephone regulation could not be effectively applied to dial-a-porn message services. This statute was the result of efforts to

solve the dangers posed by dial-a-porn services after attempts to resolve the problems through the application of traditional common carrier concepts had repeatedly failed. "This measure is necessary because the current regulations adopted by the FCC are not effective in stopping the spread of dial-a-porn to minors." 134 Cong. Rec. H1690 (daily ed. April 19, 1988) (statement of Rep. Hall).

Most, if not all, of the concerns enumerated by the Pacifica Court are present in the regulation of indecent dial-a-porn messages. First, the telephone has established a uniquely pervasive presence in the lives of Americans. These calls can confront a citizen, including a child, not only in public, but also in the privacy of the home. Telephones are routinely found in

homes, offices, public buildings, churches, schools, street corners, automobiles and like a radio or television, may be separately portable. Second, but more importantly, dial-a-porn services, like radio or television broadcasts, are uniquely accessible to children who are able, at an early age, to dial the seven-digit numbers.

The accessibility and enticement of dial-a-porn services to children is significantly more direct than the subject broadcasts of Pacifica. Children may find these numbers on newsracks on street corners, traded in schools or on business cards specifically distributed by the dial-a-porn services. Unlike the passivity of most broadcasts, dial-a-porn services engage in the active enticement

of its potential audience, including children.

Contrary to the allegations of the dial-a-porn providers, 47 U.S.C. §223(b) will not impose a standard contrary to that stated in Butler v Michigan. The indecent material available through the dial-a-porn services will continue to be available to adults who wish to hear it through other media. In addition, under the nuisance rationale supporting the indecency concept, material that would be unlawful at one time of the day may be lawfully disseminated at other times.

CONCLUSION

The District Court for the Central District of California and the Ninth Circuit Court correctly found that Congress has the Constitutional authority to proscribe obscene dial-a-porn messages. This decision is consistent with the long line of cases which support federal obscenity regulation.

This decision simply supports federal efforts to control a problem that is rapidly increasing in scope and severity. The prohibition of obscene dial-a-porn messages is consistent with the general statutory scheme and judicial interpretation of federal obscenity laws.

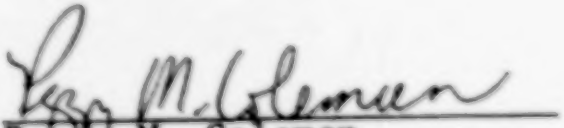
The District Court for the Central

District of California and the Ninth Circuit Court improperly held that the prohibition against indecent dial-a-porn messages was facially invalid. The interests to be protected through the prohibition against indecent telephone messages are substantially the same as those that were subject to protection under the broadcasting regulations. The nature of the telephone services and the broadcasting medium are substantially similar. Consequently, the principles of indecency regulation as stated in Pacifica are equally applicable to the dial-a-porn telephone services.

For these reasons, in addition to those urged by Appellants herein, the

decision below should be affirmed in part and reversed in part.

Respectfully submitted,
American Family
Association, Inc.



Peggy M. Coleman
Legal Counsel
Attorney for Amicus

CERTIFICATE OF SERVICE

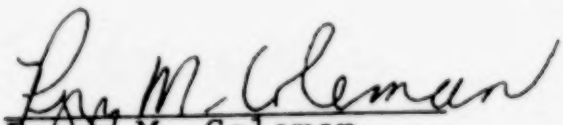
I hereby certify that three copies of the foregoing Motion for Leave to File a Brief Amicus Curiae in Support of the Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States and Brief Amicus Curiae of American Family Association, Inc., have been mailed this twenty-third day of February, 1989, to the following counsel of record:

Mr. Richard K. Simon
McDermott, Will & Emery
2029 Century Park East
Suite 3800
Los Angeles, California 90067
(213) 277-4110

Mr. William C. Bryson
Acting Solicitor General

United States Department of Justice
Washington, D.C. 20530
(202) 633-2217

All parties required to be served have been served.



Peggy M. Coleman
Attorney for Amicus Curiae

MOTION FILED
FEB 24 1989

Nos. 88-515 and 88-525

In The Supreme Court of the United States

OCTOBER TERM, 1988

Sable Communications of California, Inc., Appellant

v.

Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States

Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States, Appellants

v.

Sable Communications of California, Inc.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE AND MOTION FOR LEAVE TO FILE

Paul J. McGeady
Attorney for
Morality in Media, Inc.
Amicus Curiae
475 Riverside Drive, Suite 239
New York, New York 10115
(212) 870-3232

Robert W. Peters
475 Riverside Drive
New York, New York 10115
Of Counsel

Nos. 88-515 and 88-525

SUPREME COURT OF THE UNITED STATES

October Term, 1988

Sable Communications of California, Inc.,
Appellant

v.

Federal Communications Commission and
Richard L. Thornburgh,
Attorney General of the United States

Federal Communications Commission and
Richard L. Thornburgh, Attorney General
of the United States, Appellants

v.

Sable Communications of California, Inc.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Morality in Media, Inc. hereby respectfully moves this honorable Court, pursuant to Court Rule 36.3, for leave to file the attached brief amicus curiae in support of the Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States. The consent of the attorney for the Government has been granted, a copy of which is being filed with this Court concurrently with this motion and brief. The consent of the attorney for Sable Communications of California, Inc. was requested but refused.

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States.

This organization is now national in scope, and its Board of Directors and National Advisory Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the Presidential Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, 120 note 4

(1973) and in Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 58, notes 7 and 8 (1973).

More recently Morality In Media participated as Amicus in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978); New York v. Ferber, 458 U. S. 747 (1982), Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985), and in the consolidated cases Fort Wayne Books, Inc. v. Indiana (87-470) and Sappenfield v. Indiana (87-614).

Amicus submitted Comments in the first rulemaking proceedings by the F.C.C. on the issue of "appropriate regulation" in order to restrict access to "dial-a-porn" services to adults only; and, in July 1984, Amicus filed a Petition For Reconsideration with the Commission,

alleging that the regulation issued, 47 C.F.R. §64.201, was ineffective and would in effect reward dial-a-porn services with immunity for following ineffective rules. Amicus also filed an amicus brief in the case of Carlin Communications, Inc. v. F.C.C., 749 F.2d 113 (2nd Cir. 1984), asking the court to hold that the F.C.C. regulation in question, 47 C.F.R. §64.201, was unconstitutional.

In 1985, Amicus submitted Reply Comments in the Commission's second rulemaking proceedings, arguing that the creation of an effective plan to limit access to adults only was highly unlikely given the nature of the telephone system.

Amicus has supported Congressional effort's to amend 47 U.S.C. 223(b) in order to do away with its "safe harbor"

for obscene or indecent commercial communications and in 1988 was mentioned during the Congressional floor debate on the dial-a-porn amendment as being a National organization supporting it.

Morality in Media, Inc. files this motion and brief supporting the position of the Government because it believes that the decision in this matter will be of grave importance to all persons in the United States, especially children and their parents. Amicus believes that its brief contains arguments in support of its contention, that indecent commercial "dial-it" messages are outside First Amendment protection, which will not be advanced by the parties.

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SUMMARY OF ARGUMENT

Morality In Media contends that recognizing and classifying indecent communications for commercial purposes, by telephone, as a category of material outside the protection of the First Amendment, is supported by this Court's previous decisions, since the evil to be restricted here so overwhelmingly outweighs the expressive interests, if any, at stake.

"Indecency" is a standard separate and apart from obscenity. As this Court noted in F.C.C v. Pacifica Foundation, 438 U.S. 726 (1978):

> "Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."

The definition of indecency is grounded in the concept of "patent offensiveness." Indecent words offend

"for the same reason that obscenity offends" and are "of such slight social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." The Court in F.C.C. v. Pacifica Foundation stated that some uses of even the most offensive words are protected, but did not say that broadcast indecency is protected speech.

This honorable Court has recognized that the government may punish the use of words because of the "vulgar," "lewd," and "plainly offensive" character of the speech, apart from any propensity of the words to provoke violence or disorder. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) (the concept of present injury); Hess v. Indiana, 414 U.S. 105 (1973) (privacy interests invaded); and F.C.C. v. Pacifica, 438

U.S. 726 (1978) (importance of content and context in First Amendment analysis).

In New York v. Ferber, 458 U.S. 747 (1982), the Court classified child pornography as a category of material outside First Amendment protection because the evil to be restricted so overwhelmingly outweighed the expressive interests, if any, at stake.

Amicus contends that the prohibition in 47 U.S.C. 223(b) on indecent communication for commercial purposes, by telephone, should be upheld as a Constitutional regulation of material outside First Amendment protection because the evil of "dial-a-porn" also so overwhelmingly outweighs the expressive interests, if any, at stake.

Section 223(b)'s prohibition on indecent communication is a content-based classification, but the provision is not

"viewpoint-based," does not prohibit discussion of an entire topic, does not pronibit "political speecn," and does not suppress speech in a "public forum." Further, indecency has the same place in the "hierarchy of First Amendment Values" as obscenity.

So, too the evil to be restricted is overwhelming. Various of the governmental interests spelled out in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) to justify obscenity legislation, also justify the proscription on indecent dial-a-porn. The problem of dial-a-porn also implicates the government's interest in protecting the well-being and privacy of the home--an interest this honorable Court has described as being "of the highest order in a free and civilized society." Frisby v. Schultz, 56 LW 4785 (6/27/88) Further, the dial-a-porn problem implicates the government's

interest in "safeguarding the physical and psychological well-being of minors"--an interest the Court has identified as being "compelling."

Amicus also contends that it is not Butler v. Michigan's "harmful to minors" standard that applys to "dial-it" services, but rather Pacifica's indecency standard. Butler v. Michigan, 352 U.S. 380 (1957) is properly read to require that in any situation where one can effectively differentiate between minors and adults, a harmful to minors standard cannot be applied to adults and children alike. It does not, however, prevent the use of a different standard that is distinct from a "harmful to minors" test --namely, "indecency"--when such a differentiation cannot effectively be made or when different governmental interests are at stake. Unlike the "harmful to

minors" standard, which is specifically aimed at protecting minors from material harmful to them, the "indecency" standard is determined for a mixed audience of both children and adults.

Last, Amicus contends that the Court's summary affirmance in Wilkinson v. Jones, 107 S.Ct. 1559 (1987) (invalidating the Utah Cable Television Programming Indecency Act) does not foreclose the Court from now addressing the question of whether the First Amendment denies Congress power to prohibit indecency in an entirely different medium--to wit, telephonic communication, and in particular, "dial-it" services.

ARGUMENT

I. RECOGNIZING AND CLASSIFYING "INDECENT" TELEPHONE MESSAGES FOR COMMERCIAL PURPOSES AS A CATEGORY OF MATERIAL OUTSIDE FIRST AMENDMENT PROTECTION IS NOT INCOMPATIBLE WITH THIS COURT'S PREVIOUS DECISIONS.

A. "Indecency" Is A Legal Standard Separate And Apart From Obscenity

As amended in 1988, 47 U.S.C. 223(b) includes an absolute prohibition on both obscene or "indecent" telephone messages for commercial purposes, irrespective of whether the message is made to an adult or to a minor. Section 223(b)(1)(A) now reads:

> "[(b)(1) Whoever knowingly--] (A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person, regardless of whether the maker of such communication placed

the call; or"[1]

It is Congress' right to maintain the decency as well as the "chasteness" of interstate channels of communication in order that those channels not become the means of spreading evil that justifies this regulation. As the Court noted in United States v. Orito, 413 U.S. 139, at 144 (1973):

> "[C]ongress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promotion or spreading evil, whether of a physical, economic or moral nature."

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1. The pronibition in Section 223(a)(1)(A), which existed prior to enactment of Section 223(b), also proscribes "indecent" communication. Section 223(a)(1)(A) contains the words "obscene, lewd, lascivious, filthy, or indecent." These words are in the disjunctive which, according to the authority of F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), implies a separate meaning for each. Cf., Hott v. State, 400 N.E. 2d 206 (Ind. Ct. App. 1980), trans. den., 409 N.E. 2d 1082 (Ind. Sup. Ct. 1980), cert. den., 449 U.S. 1132 (1981); United States v. Darsey, 431 F.2d 963 (5th Cir. 1970).

Indecency is a legal standard that is separate and apart from obscenity. In F.C.C. v. Pacifica foundation, 438 U.S. 726 [hereinafter, "Pacifica"], this Court defined the term "indecent" with reference to 18 U.S.C. 1464, and rejected the claim that the broadcast of Carlin's monologue was not "indecent" because of the absence of prurient appeal:

> "Prurient appeal is an element of the obscene, but the normal definition of "indecent" merely refers to nonconformance with accepted standards of morality."[2](emphasis supplied)

At several points in its Pacifica opinion, the Court also described "indecent" material as being "patently offensive." For example, the Court states at 438 U.S. 745:

> "The question in this case is whether a broadcast of patently offensive words dealing with sex and

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2. Pacifica, at 740.

excretion may be regulated because of its content." (emphasis supplied)

Clearly, the definition of "indecent" is grounded upon the concept of "patent offensiveness." As the Pacifica Court noted,[3] Justice Harlan equated "indecency" with the concept of "patent offensiveness" when he literally substituted "indecency" for "patent offensiveness:"

> "These magazines cannot be deemed so offensive as to affront current community standards of decency--a quality that we shall hereafter refer to as 'patent offensiveness' or 'indecency.'"[4]

B. This Court's Pacifica Decision Does Not Treat Broadcast "Indecency" As Protected Speech

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3. Id., at 740, n. 15.

4. Manual Enterprises, Inc. v. Day, 370 U.S. 478, at 482 (1962), cited with approval in Hamling v. United States, 418 U.S. 87, at 112 (1974).

The fact that society might find speech offensive is not in itself necessarily a sufficient reason for suppressing it. As Pacifica points out, if it is the speaker's opinion or point of view that gives offense, First Amendment protection might be required.[5] In Pacifica, however, the words at issue gave offense "for the same reason that obscenity offends,"[6] and their place in the "hierarchy of First Amendment values"[7] was aptly described in Pacifica at 438 U.S. 746:

> "'Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' Chaplinsky v. New Hampsnire, 315

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5. Pacifica, at 746.

6. Id.

7. Id.

U.S. 568, 572."

The Court states further at 438 U.S. 743, n. 18:

> "A requirement that indecent language be avoided will have its primary effect on form, rather than the content of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language."[8]

Undoubtedly, as Pacifica states,[9] some uses of even the most offensive words are protected [See, e.g., Hess v. Indiana, 414 U.S. 105 (1973)], but in "assum[ing], arguendo, that [the Carlin] monologue

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8. In Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159, at 3164-3165 (1986) (upholding a school district's authority to prohibit an indecent speech in a school assembly), the Court was also careful to point out that the prohibition was on the "form" or "mode" of expression. Cf., Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 83-84 (1983) (Stevens, J., concurring); Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, at 546-548 (1980) (Stevens, J., concurring).

9. Pacifica, at 746.

would be protected in other contexts"[10] (emphasis supplied), the Court did not say that the FCC must provide a time of day when the monologue could be broadcast[11] and certainly did not say that indecency in the broadcast medium is protected

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10. Id.

11. In fact the Court said in a footnote (Pacifica, at 750, n. 28): "[W]hether broadcast audiences in the late evening hours contain so few children that playing this monologue would be permissible is an issue neither the Commission not this Court has decided."

speech.[12]

The Court distinguished the Carlin monologue as broadcast from the offensive words emblazoned on a jacket, at issue in Cohen v. California, 403 U.S. 15 (1971), and the nudity depicted on drive-in movie theatre screen, at issue in Erznoznik v. City of Jacksonville, 422 U.S. 205

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12. The three judge plurality opinion in Pacifica is the Court opinion and the only one that is precedential. In Marks v. United States, 430 U.S. 188 (1977), the Court said that the three judge plurality opinion in Memoirs v. Massachusetts, 383 U.S. 413 (1966) constituted the "holding of the Court and provided the governing standards," since it was the plurality opinion in Memoirs which constituted "the position taken by those members who concurred in the judgment on the narrowest grounds." The Supreme Court has generally regarded the narrowest ground as the rationale offered in support of the result that would affect and control the fewest cases in the future. Cf. Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Col. L. Rev. 756 (1980).

The Pacifica Court reviewed only the Commission's holding that the Carlin monologue "as broadcast was indecent and prohibited by 18 U.S.C. 1461." Id. at 732, 734-735.

(1975).[13] Noting that each "medium of expression presents special First Amendment problems,"[14] the Pacifica Court concluded that two characteristics of the broadcast medium justified special treatment of indecent broadcast:

> 1. Its pervasive presence in the lives of all Americans and the fact that it confronts the citizen not only in public but also in the privacy of the home, where the right of the individual to be left alone outweighs any First Amendment right of the intruder.
> 2. The ease with which children may obtain access to it.[15]

As to the latter characteristic, the

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13. Pacifica, at 747, n. 25; 749 (and n. 27). The Court in Pacifica did not analyze the prohibition on indecent broadcast in 18 U.S.C. 1464 as a time, place and manner restriction, as it did the zoning regulation in Young v. American Mini Theatres, 427 U.S. 50 (1976); nor did it subject the prohibition to the "critical scrutiny" it demanded in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (involving speech "at the heart of the First Amendment's protection").

14. Pacifica, at 748.

15. Id., at 748-749.

Court went on to reject the argument that the prohibition on broadcast indecency reduced adults to hearing only what is fit for children, pointing out that adults could still attend a night club or purchase a tape if they wanted to hear the words.[16] So too, the Court recognized that a broadcast radio station, unlike an "adult" bookstore or movie theatre, cannot be effectively regulated in order to protect minors, without restricting expression at its source.[17]

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16. Id., at 750, n. 28.

17. Id., at 749.

C. Indecent Speech May Be Punished Regardless Of Any Tendency To Provoke Violence Or Disorder Among The Hearers

This honorable Court has long recognized that the right to speak is not absolute at all times and under all circumstances. In Chaplinsky v. New Hampshire 315 U.S. 568, 571-572 (1941), the Court stated:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting, or 'fighting words'--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (footnotes omitted)(citing, inter alia, Chafee, Free Speech in the United States, p. 149-150 (1941)). (emphasis supplied)

The concept of "present injury" formed in part the basis of Chafee's "Normal Criminal Law of Words:"

> "But the law also punishes a few classes of words like obscenity, profanity, and gross libels upon individuals, because the very utterance of such words is considered to inflict a present injury upon listeners, readers, or those defamed, or else to render highly probable an immediate breach of the peace.
>
> [T]hese verbal peace time crimes...are too well-recognized to question their constitutionality, but I believe that if they are properly limited, they fall outside the protection of the free speech clauses.... ...The true explanation...is that profanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young, and the peace of mind of those who hear and see."[18] (emphasis supplied)

So too, the Model Penal Code, Section 250.2 (Proposed Official Draft 1962)

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18. Chafee, Free Speech in the United States, p. 149-150 (1942).

prohibits "offensively coarse utterances," rejecting the notion that words may only be punished if they provoke violence:

> "Coarse or indecent language is penalized under clause (b) regardless of any actual or presumed tendency to evoke disorder among the hearers, since the interest we seek to protect is freedom from present nuisance rather than freedom from anticipated violence. The concept of present injury is the basis on which, Chafee rested the 'Normal Criminal Law of Words,'.... A rule that words may be punished only if they tend to provoke violence would give immunity to disgusting public verbal behavior merely because the unwilling audience comprised only persons too timid, weak, or well-behaved to respond with disorderly violence."[19]

In Rosenfeld v. New Jersey, 408 U.S. 901 (1972), a memorandum case in which a defendant used concededly filthy language during a public school board meeting in New Jersey, three Justices of this Court, writing in dissent, stressed the "grossly

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19. Model Penal Code, Tentative Draft 13, at 7 (1961).

offensive and emotionally disturbing"

nature of the speech involved:

> "But the exception to First Amendment protection recognized in Chaplinsky is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence.
> ....
> I agree with th[e] view that a verbal asssault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance.
> The Model Penal Code...also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within the protection of the First Amendment. See Model Penal Code §250.2(1)(a) and (b). (Proposed Official Draft 1962)."[20] (emphasis supplied)

In Hess v. Indiana, 414 U.S. 105, at 107-108 (1973), this Court recognized that

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20. Id., at 905-906. See also, Plummer v. City of Columbus, 414 U.S. 3, at 4 (1973) (Powell, J., dissenting).

some words which do not amount to "fighting words" but which do intrude upon the privacy rights of others in an essentially intolerable manner are outside the protection of the First Amendment:

> "Indiana's disorderly conduct statute was applied in this case to punish only spoken words. It hardly needs repeating that 'the constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech."' ...In the first place, it is clear that the Indiana court specifically abjured any suggestion that Hess' words could be punished as obscene.... ...By the same token, any suggestion that Hess' speech amounted to 'fighting words,'...could not withstand scrutiny. ...In addition, there was no evidence to indicate Hess'speech amounted to a public nuisance in that privacy interests were being invaded. 'The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is...dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.' Cohen v. California, supra, at

21.[21]

In F.C.C. v. Pacifica Foundation, this Court again recognized that both the content and context of speech are critical elements of First Amendment analysis.[22] In its analysis of content, the Court focused on three characteristics of the Carlin monologue: the offensiveness of the words used and their limited speech value,[23] and the harmful effect of such words:

> "The Commission stated: 'Obnoxious, gutter language describing these matters has the effect of debasing and brutilizing human beings by reducing them to

21. Cf., Kovacs v. Cooper, 336 U.S. 77, at 87, 89 (1949) ("In his home...he is practically helpless to escape this interference with his privacy by loud speakers.... That more people may be more easily and cheaply reached by sound trucks,...is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance...."). (emphasis supplied)

22. Pacifica, at 744.

23. See infra at 11-12.

their mere bodily functions....' 56 F.C.C. 2d, at 98. Our society has a tradition of peforming certain bodily functions in private, and of severly limiting the public exposure or discussion of such matters. Verbal or physical acts exposing those intimacies are offensive irrespective of any message that may accompany the exposure."[24] (emphasis supplied)

The Court continues at 438 U.S. 746:

"Such utterances...are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. (emphasis supplied)

And, at 438 U.S. 748-749, the Court said:

"To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an

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24. Pacifica, at 746, n. 23. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, at 63 (1973), the Court stated that experience affords an ample basis for legislatures to conclude that "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex."

> assault is to run away from the blow. One may hang up on an indecent phone call, but that option does not give the caller a Constitutional immunity or avoid a harm that has already taken place."

As noted previously,[26] the Pacifica Court found two characteristics of the broadcast media to be crucial on the issue of context: the pervasive nature of the medium, confronting the citizen not only in public but also intruding into the privacy of the home and its accessibility to children. Clearly, the Court in Pacifica was concerned about preventing exposure of indecent broadcast to adults, especially in the privacy of the home, and about the harmful effect that a minor's exposure to indecent broadcast might entail, in any location.

The Court's decision in Bethel School District No. 403 v. Fraser, 106 S.Ct.

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26. See infra at 15.

3159, did not rest upon a finding that the student's speech in a school assembly had any "propensity" to "materially disrupt" classwork, but rather on the "vulgar," "lewd" and "plainly offensive" character of the speech.[27] Further, the Court in Bethel did not say that the school district must provide a place in a school setting and a time during the school day, or after school hours, when the student would be permitted to present his "offensively lewd and indecent speech" to

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27. In Hazelwood School District v. Kuhlmeier, 56 LW 4079, at 4082 (1/13/88) (upholding a high school principle's decision to delete two articles from a school newspaper), the Court stated that a school may disassociate itself not only from speech that would "materially disrupt classwork or involve substantial disorder or invasion of the rights of others," but also from speech "that is, for example, ... vulgar, or profane or unsuitable for immature audiences." The Court noted that its decision in Bethel did not rest upon any finding that the speech had any "propensity" to "materially disrupt" classwork, but rather on the "vulgar," "lewd," and "plainly offensive" character of the speech. Kuhlmeier, at 4082, n. 4.

the student body.[28]

In Hustler Magazine, Inc. v. Falwell, 56 LW 4180, (2/24/88) the Court noted that the oft-repeated First amendment principle that the public expression of ideas cannot be prohibited simply because some hearers find the ideas offensive is, like other priniciples, "subject to limitations."[29]

The Court then said:

> "We recognized in Pacifica Foundation, that speech that is 'vulgar,' 'offensive' and 'shocking' is 'not entitled to absolute constitutional protection under all circumstances.' 438 U.S., at 747. In Chaplinsky v. New Hampshire... we held that a state could lawfully punish an individual for the use of insulting '"fighting" words--those which by their very nature inflict injury or tend to incite an immediate

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28. In the regard, compare the Court's treatment of the zoning ordinance in City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986) and the picketing ordinance in Boos v. Barry, 56 LW 4254 (3/22/88) (content-based restriction on political speech in a public forum).

29. Id., at 4182.

breach of the peace.' ...These limitations are but recognition of the observation...that this Court has 'long recognized that not all speech if of equal First Amendment importance.'"

D. Classifying Section 223(b)'s Indecent Commercial Communications, By Telephone, As A Category Of Material Outside First Amendment Protection Is Justified Because The Evil To Be Restricted So Overwhelmingly Outweighs The Expressive Interests If Any At Stake

In New York v. Ferber, 458 U.S. 747, at 763 (1982), this Court noted that "recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions."

The Court continues at 458 U.S. 763-764:

"It is not rare that a content-based classification of speech has been accepted because it may be

appropriately generalized that within the confines of the given classification the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjucation is required."

Recognizing and classifying indecent telephonic communications for commerical purposes as a category of material outside the protection of the First Amendment is also not incompatible with this Court's previous decisions, since the evil to be restricted here also so overwhelmingly outweighs the expressive interests at stake.

While the indecency prohibition in 47 U.S.C. 223(b) is a content-based classification, the provision is not "viewpoint-based,"30 does not prohibit

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30. Cf., Boos v. Barry, 56 L.W. 4255, 4256 (3/22/88)

public discussion of an entire topic,[31] does not pronibit "political speech,"[32] and does not attempt to suppress speech in

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31. Cf., Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530, at 537-540. Section 223(b)'s prohibition on indecent communication does not, for example, prohibit "frank talk" about sex. The statute is aimed at the patently offensive manner of expression, not subject matter.

32. Cf., Boos v. Barry, at 4257.

a "public forum."[33] Rather, the indecency prohibition in Section 223(b) is on the form or mode of the speakers communication, and, as this Court has been careful to point out in its previous decisions upholding restrictions on "indecent" communication, a requirement that "indecent" language be avoided has

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33. A private telephone company's status as a public utility doesn't convert its "dial-it" network into a public forum. See, Carlin Communications, Inc. v. Mountain States Telephone, 827 F.2d 1291 (9th Cir. 1987), cert. den., 108 S.Ct. 1586 (1988) and Carlin Communications, Inc. v. Southern Bell, 802 F.2d 1352 (11th Cir. 1986), both upholding a private phone company's right to exclude dial-a-porn messages from its 976 network. As noted in Perry Education Assn. v. Perry Local Educator's Assn., 460 U.S. 37, at 49, n. 9 (1983): "[T]ne mere fact that an instrumentality is used for the communication of ideas does not make a public forum."

Further, the vast majority of telephones are private property and are located on private property. Cf., Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 77-78 (1983) (Rennquist, J., concurring) ("Because the home mailbox has features which distinguish it from a public hall or public park, ... it cannot be totally assimilated for purposes of analysis with these traditional public forums.").

little or no effect on serious communication.[34]

Further, this Court has held that society's interest in protecting erotic materials is of a "wholly different, and lesser, magnitude,"[35] that commercial speech involving no matters of public concern has "reduced constitutional value,"[36] and, that "indecent" utterances have the same place in the "hierarchy of First Amendment values"[37] as obscenity. Dial-a-porn is indeed crass commercial

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34. For example, in Bethel School District No. 403 v. Fraser, 106 S.Ct. 3159, 3164, the Court noted that a prohibition on the use of indecent language in Congress had not in the least dampened the vigour of political debate in that esteemed institution.

35. Young v. American Mini Theatres, 427 U.S. 50, at 70 (1976).

36. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 479, 761 (1985).

37. See infra p. 11.

exploitation of sex.[38] It's subject matter is (or ought to be) intensely private.[39] Its offensiveness is attested to by the public outcry that arose not long after the industry's inception[40] and

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38. See infra, n. 24.

39. See infra p. 23.

40. On December 20, 1983, the Federal Communications Commission issued a Further Notice of Inquiry and Notice of Proposed Rule Making to afford interested parties an opportunity to comment on the Congressional amendment to Section 223, requiring the FCC to regulate dial-a-porn so as to restrict access to adults only. As reported in a February 19, 1984 New York Times Article:

> "[M]ore than 25,000 [people] have let the Federal Communications Commission know what they think about telephone sex services, known generally as 'Dial-a-Porn'....
>
> The Commission asked for public comment last December. But no one at the agency predicted the deluge of mail received in response.
>
> The letters, stacked in boxes for review by agency attorney's, came from all parts of the country. ...Most of them are written by mothers. And their message is virtually uniform: Do not try to regulate 'Dial-a-Porn' services; ban them."

which has continued unabated.[41]

So too, the evil to be restricted overwhelmingly outweighs the expressive interests, if any, at stake in the regulation of "indecent" dial-a-porn. As noted at the outset, Congress may regulate the channels of interstate commerce in order that those channels will not become the means of spreading evil, of a physical, moral or economic nature. Various of the governmental interests spelled out by the Court in Paris Adult Theatre I v. Slaton, 413 U.S. 49, to justify obscenity legislation, also justify the proscription on indecent dial-a-porn. These include the social

41. See, e.g., Carlin Communications v. Mountain States Telephone, 827 F.2d at 1293 ("Community reaction to Carlin's message was strongly adverse. School officials complained about children calling Carlin's number, newspaper editorials chastised Mountain Bell for profiting from such entertainment....").

interest in order and morality,[42] the quality of life and total community environment, and, very likely, the public safety itself. Mr. Chief Justice Burger best summed it up when he said "There is a right of the Nation and of the States to maintain a decent society."[43]

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42. It is axiomatic that legislation may be based on health, safety, welfare or morals. In Bowers v. Hardwick, 106 S.Ct. 2841, at 2846 (1986), this Court stated that the law is "constantly based on notions of morality." Cf., Roth v. United States, 354 U.S. 476, at 502 (1957), where Justice Harlan, concurring, said:

> "[E]ven assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of material, the essential character of which is to degrade sex, will have an eroding effect on moral standards."

43. Paris Adult Theatre I, 413 U.S. at 59-60. See also, Rosenfeld v. New Jersey, 408 U.S. at 902, (Burger, J., dissenting) ("If continued, this permissiveness will tend further to erode public confidence in the law—that suble but indispensible ingredient of ordered liberty.")

Prior decisions of this Court have also remarked on the unique nature of the nome. For example, in Frisby v. Schultz, 56 LW 4785, at 4788 (6/27/88) the Court stated:

> "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.
> ....
> ...A special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that government may protect this freedom. See, e.g., FCC v. Pacifica Foundation, 438 U.S. 726, 748-749 (1978)...."

With the advent of the commercial "dial-it" industry, pornographers for the first time in the history of the United States, obtained direct and uninvited access to virtually every home in the nation. In 1983 Congress attempted to

regulate dial-a-porn on the mistaken notion that such "expression" was protected by the First Amendment. Congress failed and today hardcore explicit sex is just a "dial-away" for every man, woman, and child who has access to a phone. Just as adults are entitled to walk down a public street without the necessity of having to avert their eyes (or their children's eyes) to avoid a public "nude performance," and to send their children to a public school without the necessity of exposing them to an offensively lewd and indecent speech in a school assembly, they are also entitled to turn a TV, radio, or telephone dial in the privacy of the home, or leave their children freedom to do so, without subjecting themselves or their children to viewing intrusive nudity or explicit sex,

or hearing descriptions of the same.[44]

Further, as this Court stated in its New York v. Ferber decision, at 458 U.S. 756-757:

> "It is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of minors' is 'compelling.' ...In Ginsberg v. New York, 390 U.S. 629 (1968), we sustained a New York ["harmful to minors"] law protecting children from exposure to nonobscene literature. Most recently, we held that the government's interest in the

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44. The Pacifica Court was evidently very concerned about the impact of broadcast indecency on the unwilling or unsuspecting adult. Many, if not most, adults who are frequent users of pornographic material (which includes dial-a-porn), however, become addicted to it, and it is misleading to describe their use of it as "willing." Further, as noted above, governmental concerns other than exposure of indecent matter to unwilling adults and minors are at stake. These valid governmental concerns are immeasurably amplified when the medium of expression is pervasive and confronts the citizen not only in public but in the privacy of the home. Cf., Paris Adult Theatre, 413 U.S. at 57 (no concept of "consenting adults" applicable); United States v. Orito, 413 U.S. at 143 ("That the transporter has the abstract proprietary power to shield ... all others ... is not controlling.")

'well-being of its youth' justified special treatment of indecent broadcasting received by adults as well as children. FCC v. Pacifica Foundation...."

The Ferber decision did not involve the interests of adults in the privacy of the home, and its reference to Pacifica cannot be read as disavowing any governmental interest in shielding adult viewers from broadcast indecency. The Pacifica Court was clearly concerned about the impact of indecent broadcast on both adults and children, and this Court's decision in Frisby v. Schultz[45] is the clearest indication that this Court has not "disavowed" the governmental interest in protecting the privacy of the home.[46]

What the Court in Pacifica did indicate, and what this Court in Ferber

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45. See infra at 35.

46. See also, Bolger v. Youngs Drug Products Corp., 463 U.S. at 77-78, (Rehnquist, J., concurring).

affirms, is that the ease with which children may obtain access to broadcast material, coupled with the government's compelling interest in the well-being of youth and in supporting parental authority in the home, could itself justify Congress' special treatment of indecent broadcasting. While so-called "adult" bookstores, theatres and other similar establishments can keep minors out without denying access to adults, a physical separation of the broadcast audience is impossible.

A physical separation of the "dial-it" audience is also impossible, and the compelling governmental interest in protecting youth and in supporting parents could itself justify the statutory ban on indecent "dial-it" messages, even though some presumably "willing" adults are also in the audience.

II. NOT BUTLER'S "HARMFUL TO MINORS" STANDARD BUT RATHER PACIFICA'S INDECENCY STANDARD APPLYS TO "DIAL-IT" SERVICES

The reasoning of this Court in upholding use of the indecency standard for radio broadcasts is applicable to commercial "dial-it" services. It is not the speakers opinion or point of view about sexual matters that is the target of 47 U.S.C. 223(b)'s pronibition on indecent commercial telephone messages. No, the words that the federal dial-a-porn statute proscribes offend for the "same reason that obscenity offends," are "no essential part of any exposition of ideas," and are of "such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

The effect of enforcing Section 223(b)'s prohibition on indecent "dial-a-porn" will be on the form, rather than content, of serious communication and only then if the words used are so offensive as to affront current community standards. The prohibition in Section 223(b) is, therefore, clearly distinguisnable from tne statutory ban on contraceptive advertisements invalidated by this Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). In Bolger tne Court found tnat tne particular advertisements for contraceptives conveyed truthful information relevant to important social issues and bearing on parents' ability to discuss sexual matters with tneir cnildren.[47]

Telephonic communications, like tne

47. Id., at 69, 74-75.

broadcast media, have established a pervasive presence in the life of the American people. A telephone and a radio or television can be found in almost every nome. Telephones are also found in the work place, retail establisnments, restaurants, theatres, and the like, as well public transportation facilities and on busy street corners. With the advent of the wireless, portable telepnone, phones are also now found in cars, airplanes, and, increasingly, brief cases. With the advent of the so-called "976 network," thousands of individuals can now simultaneously listen to the same

recorded message.[48] Some phone systems now even permit the caller to see the person they are calling.

Commercial "dial-it" services have unimpeded access to almost every telephone receiver, and, just as patently offensive, indecent material broadcast over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, such material transmitted via telephone lines (and often without) also confronts the citizen not

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48. In Carlin Communications v. Mountain States Telephone, 827 F.2d 1291 (1987), cert. den., 108 U.S. 1586 (1988), the Ninth Circuit Court of Appeals questioned whether the Arizona public utility law was applicable to Bell's 976 network. The Court reasoned that since over 7,900 persons can simultaneously listen to the same message on a 976 network, the telephone "is serving as a medium by which Carlin broadcasts its messages. The phone company resembles less a common carrier than it does a small radio station." Id., at 1294. As reported in the February 12, 1989 issue of Newsday (at p. 77), FDR Interactive Technologies, a division of American Express, announced "a way to handle up to 30,000 simultaneous phone calls."

only in public but also in the privacy of the home.

While it is true that telephone users do not normally call telephone numbers on a random basis, as a broadcast audience may scan radio frequencies or TV channels, telephone users do frequently dial the wrong number and may also call "dial it" services without knowing the exact nature of the service called, just as the broadcast audience may tune in on a particular program without fully appreciating what they might be subjecting themselves to. While the careless, curious, or susceptible in the marketplace may have to proceed at their own risk, a man or woman in the privacy of his or her own home should not have to do so.

The ease with which children obtain access to "dial-it" services is well

documented.[49] Children access such services by mistake, out of curiosity, through peer pressure, for the "fun of it," and because of addiction. Unlike the mails which arrive once during the day and usually at a set time, "dial-it" services, like radio or TV broadcast, are accessible twenty-four hours-a-day, inside the home and out, and do not arrive in a sealed

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49. After reporting a story about a 15 year old boy who ran up a phone bill of $5,312 for calls to a "976 number that offered sexually explicit conversation," Los Angeles Times staff writer Kim Murphy, in a September 28, 1987 article, wrote the following about the "dial-a-message industry:"

> "Federal regulators say they are only now coming to grips with a technology that many now acknowledge was available in living rooms across America before anyone knew quite what it was.
>
> 'I think it got out of control for a while,' said Susan West, a Federal Communications Commission analyst....
>
> 'I really can't believe that there's...a kid in this country who hasn't called one of these lines by now, and I think we've heard from everyone of their parents. We just have gotten hundreds of thousands of letters and phone calls about it. People are upset,' she said."

envelope or require an ability to read.

Nor will the prohibition in Section 223(b) against indecent commercial communications by telephone reduce adults to receiving only those materials that are fit for minors. Adults will still be able to attend a nightclub or theatre or purchase tapes, videos, or reading materials if they want to hear or read these words. Butler v. Michigan, 352 U.S. 380 (1957) concerned a statute imposing a statewide prohibition on the dissemination of material (the printed word, pictorial matter, "recordings," things) "manifestly tending to the corruption of youth"--i.e., harmful to minors. On that issue, that Court said at 352 U.S. 383:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population...to

reading only what is fit for children."

Butler is also properly read to require that, in any situation where one can effectively differentiate between minors and adults, a "harmful to minors" standard cannot be applied to adults and children alike. It does not, however, prevent the use of a completely different standard that is distinct from a "harmful to minors" test--namely, "indecency"--either when such a differentiation cannot be made or where the governmental concerns are distinct from those supporting application of the "harmful to minors" test.

"Dial-it" services, like the broadcast media, cannot reasonably differentiate between adults and minors, since it is impossible to prevent minors from calling these services as structured. At present, any man, woman or child can

pick up a telephone and obtain access to a wide variety of "dial-a-porn" services, and Pacifica did not place on parents the onus of taking extraordinary precautions to protect their children either in public or in the privacy of the home.[50]

There is another reason why application of the indecency standard--whether to the broadcast medium, a public school assembly, the halls of Congress, or commerical telephonic communications--does not reduce adults to reading, seeing or hearing that which is fit for children. Unlike the "harmful to minors" standard, which is specifically aimed at protecting minors from material

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50. Technology was available prior to the Court's decision in Pacifica which in theory would have enabled parents to block offensive programming in the home. See, e.g., Brief for Respondent Pacifica Foundation at 49, n. 40, F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), where such technology was described.

harmful to them, the "indecency" standard is an "Indecent For All" standard and is determined for a mixed audience of both children and adults.

This Court in Pacifica, in upholding a statutory prohibition on indecency in the broadcast medium, was clearly concerned with protecting both adults and children. The Court likened the impact of an indecent broadcast upon adults to a physical assault.[51]

In Bethel School District No. 403 v. Fraser, 106 S.Ct. at 3164-3165, the Court, after noting that members of Congress were prohibited from using "indecent language against the proceedings of the House," stated that the "pervasive sexual innuendo" in the student's speech was:

"Plainly offensive to both

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51. Pacifica, at 748-749.

> teachers and students--indeed to any mature person." (emphasis supplied).

The Bethel Court's focus was not "prurient appeal for minors" but rather the inculcation of habits and manners of civility--suitable not "for a sandbox," but rather necessary to the maintenance of a democratic political society:

> "The role and purpose of the American public school system was well described by two historians, saying, 'public education must prepare pupils for citizenship in the Republic.... It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.' ...[W]e echoed the essence of this statement of the objectives of public education as the 'inculca[tion of] fundamental values necessary to the maintenance of a democratic political system.' ...[T]hese 'fundamental values' must take into account consideration of the sensibilities of others,.... The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's

countervailing interest in teaching students the boundaries of socially appropriate behavior."[52] (emphasis supplied)

Accessibility by minors to dial-a-porn services was a primary concern to Congress in the adoption of the current version of Section 223(b). NotButler v. Michigan's "harmful to minors" standard, however, but rather Pacifica's indecency standard applies to the "dial-it" industry. The Pacifica Court rejected the argument that the use of an indecency standard in the broadcast medium violated Butler, and the rationale of Pacifica clearly applies to "dial-it" services.

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52. Id., at 3164. Nor is regulation of the kind of public nudity traditionally subject to indecent exposure laws justified on the sole basis that such nudity may harm minors. Cf., Erznoznick v. City of Jacksonville, 422 U.S. 205 at 211, n.7 (1975); State v. Baysinger, 97 N.E.2d 580 (Ind. Sup. Ct. 1979), appeals denied sub nom. Clark v. State, 446 U.S. 931 (1980) and Dove v. State, 449 U.S. 806 (1980).

III. THIS COURT'S DECISION IN WILKINSON V. JONES DOES NOT BAR GOVERNMENT REGULATION OF INDECENT DIAL-A-PORN

In Wilkinson v. Jones, 107 S.Ct. 1559 (3/23/87), this Court summarily affirmed witnout opinion a decision of tne Tenth Circuit Court of Appeals[53] invalidating tne Utan Cable Television Programmng Decency Act. Cnief Justice Rennquist and Justice O'Connor noted probable Jurisdiction and voted to set the case down for oral argument. Tne Court of Appeals in a brief per curiam opinion nad affirmed the decision of tne United States Supreme Court for the District of Utan,[54] basing its affirmance "on the basis of the reasons stated in the [District Court] opinion." Circuit Judge Baldock, wno agreed that tne Utan law was vague and

53. Wilkinson v. Community Television, 800 F.2d 989 (10tn Cir. 1986).

54. Community Television v. Wilkinson, 611 F. Supp. 1099 (D.C. Utan (1985).

overbroad, wrote a lengthy concurring opinion supporting his conclusion that "the Pacifica rationale for the regulation of indecency applies to cablecasting."[55]

The opinion of the District Court, relied on by the Tenth Circuit, held that the Utah Cable Television Programming Decency Act was both unconstitutionally overbroad and vague and that the Utah statute was preempted. While dicta or loose language in the District Court's opinion has prompted some to assert that the court's decision rests on a determination that the First Amendment prevents government prohibitions on all non-obscene cable TV programming, language in the opinion indicates that a more narrowly drawn and specifically delineated statute could have been found

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55. Wilkinson, 800 F.2d at 1006.

constitutional. Clearly, the District Court decision could rest on various grounds and should not be read as establishing the broadest possible constitutional principle.

An examination of the Jurisdictional Statement, submitted to the Supreme Court by Appellant David L. Wilkinson, and the Motion To Affirm, submitted to the Court by Appellees, further illustrates why the District Court decision should be read narrowly. The first question presented in Appellant's Jurisdictional Statement reads as follows:

> "(1) '[W]hether the first Amendment denies government any power to restrict the public [dissemination] of indecent [material on cable television] in any circumstances.' F.C.C. v. Pacifica Foundation, 438 U.S. 726, 744 (1978) (opinion of Stevens, J.)"[56]
> (brackets in original)

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56. Jurisdictional Statement at (i), Wilkinson v. Jones, 107 S.Ct. 1559 (1987).

In their Motion To Affirm, Appellees argued:

> "[T]he statute at issue and the judgment below simply do not require or justify consideration of [that] question[].[57]

And at pages 20-21 of their Motion To Affirm Appellees state:

> In an effort to persuade this Court of the importance of the issue raised on appeal, appellant not only asks the Court to abstract from this case the broadest constitutional issue raised...but to disregard the other necessarily attendant issues that make clear that this statute is infirm on narrower constitutional grounds.

By summarily affirming the Circuit Court opinion, this Court provided no indication of the rationale of the Court in affirming or of the Justices that voted to affirm. Some or all of the Justices could have concluded that the Utah statute as such was vague or overbroad, without

57. Motion to Affirm at 9, Wilkinson v. Jones.

actually deciding Appellant's broad constitutional issue as phrased in question (1) above.

As this Court stated in Mandel v. Bradley, 432 U.S. 173, 176 (1978):

> Summary actions...should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved. (emphasis supplied)

The Court in Mandel indicated that the "precedential significance" of a summary decision must be assessed in light of all the facts in that decision and that where the facts of a subsequent case are "very different," lower courts must make an "independent examination of the merits" in the new case.[58]

If this Court's summary affirmance in Wilkinson v. Jones does not foreclose either lower courts or this honorable

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58. Id., at 177.

Court itself from addressing in a future case the question of the validity of carefully constructed cable TV indecency legislation, it certainly does not foreclose the Court from now addressing the issue of whether the First Amendment denies Congress power to prohibit indecent communication in an entirely different medium--to wit, telephonic communications, and, in particular, commercial "dial-it" services. As the Court noted in its Pacifica decision:

> Each medium of expression presents special First Amendment problems.[59]

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59. Pacifica, at 748.

CONCLUSION

For the foregoing reasons, Amicus respectfully submits that the decision of the District Court for the Central District of California holding unconstitutional the "indecency" pronibition in 47 U.S.C. 223(b) is erroneous and should be reversed. Paris v. Adult Theatre I v. Slaton, supra, reminds us that the government has a right to maintain a "Decent Society."

Dated, February 23, 1989

Paul J. McGeady
Attorney For Morality
In Media, Inc.
Movant-Amicus Curiae
475 Riverside Drive
New York, N.Y. 10115

Robert W. Peters
Of Counsel

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Nos. 88-515, 88-525

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the Central District of California

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF MINORITY MEMBERS OF THE COMMITTEE ON ENERGY AND COMMERCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

[Members Listed on Inside Cover]

JOHN J. ADAMS *
2000 Pennsylvania Avenue, N.W.
Suite 9000
Washington, D.C. 20006

TERRY L. HAINES
Minority Counsel
U.S. House of Representatives
Committee on Energy and Commerce
2322 Rayburn House Office Bldg.
Washington, D.C. 20515
(202) 226-3400

February 23, 1989

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF FOR MINORITY MEMBERS OF THE COMMITTEE ON ENERGY AND COMMERCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

The undersigned members of the United States House of Representatives hereby respectfully move for leave to file the attached brief as *amici curiae* in support of Appellees in this case. The Acting Solicitor General of the United States has given his consent to the filing of this brief. We have requested consent from Sable Communications of California, Inc., but have not yet received a response.

Movants are each of the Minority Members of the U.S. House of Representatives Committee on Energy and Commerce in the 101st Congress. This Committee has legis-

lative jurisdiction over the Communications Act of 1934 and oversight responsibility for the Federal Communications Commission. Movants were also each cosponsors of H.R. 1786 in the 100th Congress, the terms of which were enacted as Section 223(b) of the Communications Act of 1934, the constitutionality of which is now before the Court. H.R. 1786 was the subject of a hearing before the Subcommittee on Telecommunications and Finance in 1987. Nine of the seventeen Movants were Members of this Subcommittee at the time of this hearing. Thus, the disposition of these cases is of keen interest to the undersigned Members of Congress.

For this reason, Movants respectfully request this Court to grant leave to file this brief as *amici curiae*.

Respectfully submitted,

JOHN J. ADAMS *
2000 Pennsylvania Avenue, N.W.
Suite 9000
Washington, D.C. 20006

TERRY L. HAINES
Minority Counsel
U.S. House of Representatives
Committee on Energy and
Commerce
2322 Rayburn House Office Bldg.
Washington, D.C. 20515
(202) 226-3400

February 23, 1989

* Counsel of Record

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BRIEF OF MINORITY MEMBERS OF THE COMMITTEE ON ENERGY AND COMMERCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

INTEREST OF THE AMICI

We, the undersigned Members of Congress, hereby submit this brief as *amici curiae* in the above-captioned case, and hereby move for permission to file these comments in accordance with Supreme Court Rule 36. *Amici curiae* are each of the Minority Members of the U.S. House of Representatives Committee on Energy and Commerce in the 101st Congress. This Committee has legislative jurisdiction over the Communications Act of 1934 and oversight responsibility for the Federal Communications Commission. *Amici curiae* were also each cosponsors of H.R. 1786 in the 100th Congress, the terms of which were

enacted as Section 223(b) of the Communications Act of 1934, the constitutionality of which is now before the Court. H.R. 1786 was the subject of a hearing before the Subcommittee on Telecommunications and Finance in 1987. Nine of the seventeen *amici curiae* were Members of this Subcommittee at the time of this hearing. Thus, the disposition of these cases is of keen interest to the undersigned Members of Congress. We would appreciate the full and complete consideration by the Court of the arguments made herein.

SUMMARY OF ARGUMENT

We submit this brief because it is essential that, to decide this case, the Court has a complete appreciation of the defects inherent in the regulatory and technological alternatives that were considered and rejected by Congress before it enacted a prohibition on obscene and indecent telephone transmissions for commercial purposes, or "dial-porn." Pub.L. No. 100-297 (1988), *codified at* Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b) (1988). This is especially important in the case before the Court because, unlike most legislation, the only legislative history to be found to illuminate the purpose and reasons for which the statute was passed can be found in the Congressional floor debates on the "dial-porn" provision. *See* 134 Cong. Rec. H1690-H1836 (daily ed. Apr. 19, 1988) [hereinafter "*Record*"].

ARGUMENT

I. THE CONGRESSIONAL INVESTIGATION

In evaluating the constitutionality of the dial-porn ban, the Court must recognize that Congress investigated every alternative means of curbing dial-porn, and found that the current capabilities of the public telephone network made impossible any other solution which would have been effective while less directly implicating First

Amendment rights. The House undertook an exhaustive investigation of the present ability of the public telephone network to block access to dial-porn. The House examined every conceivable method by which access to dial-porn by children could be effectively curtailed, and all consequences of each method. Only after examining all alternatives did the House (and Congress) conclude that there were no regulatory alternatives to a ban on obscene and indecent language for commercial purposes that would have effectively barred access to dial-porn by children.

The House first examined a "presubscription" approach. "Presubscription" contemplates a system whereby anyone who wishes to receive a telephone "dial-it" service (including dial-porn) could do so only after subscribing to that service. This approach proved to be economically infeasible for telephone companies to administer. More importantly, the total presubscription approach would have had the unintended and undesirable effect of driving most of the "legitimate" dial-it services, like dial-sports, dial-realtor, etc., out of business. The utility of these services depends on easy access by the public; presubscription would have removed the ability of the average citizen to "dial up" an information service without first being required to contact the local telephone company and having the number(s) unblocked which he or she wished to dial. Moreover, under a presubscription approach, dial-it services would not be available to many customers who otherwise would access them by coin-operated pay telephones or from telephones other than their own.

The result would have been a severe and negative effect on the ability of "dial-it" providers to market service with no content that could be considered harmful to children. This action also would have raised First Amendment questions as to whether presubscription was the least restrictive alternative available to prevent children

from gaining access to dial-porn. Finally, this presubscription approach would have been contrary to Congress' recent determination that providing new information services to the public is in the public interest and should be encouraged. *See* Section 7(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 157(a) (1983).

Congress next considered a purely "technological" approach: requiring telephone companies to permit subscribers selectively to curtail access, or "block," certain telephone number(s). However, after exhaustive discussions with representatives of AT&T, the Bell Operating Companies, and other local and long-distance telephone companies, Congress soon discovered that this approach was infeasible as well. The information submitted to Congress by the telephone industry revealed that the public telephone network is not technologically sophisticated enough to permit a subscriber to call his local and long-distance telephone companies and request that particular telephone numbers be "blocked."

Moreover, Congress found that a pure "blocking" approach would not solve the problem entirely. Dial-porn services frequently do not inform telephone companies of the true purpose to which their dial-it line will be put; moreover, they switch numbers after a short time. As a result, telephone subscribers could never be certain that the numbers which were blocked were still dial-porn services, or that their telephone blocked all dial-porn services. Likewise, it would be impossible under such a scheme for telephone companies to ensure at all times that dial-it lines were being used for legitimate purposes and that dial-porn providers had not switched to new lines that were not blocked by subscribers' telephones. Finally, such a blocking system would not prevent children from gaining access to dial-porn from telephones located outside of their homes.

Since these "technological" solutions could not solve the problem of children's access to dial-porn, other regu-

latory approaches were considered by Congress. The approach rejected by the House during its April 19, 1988 debate proposed a regulatory mechanism that would have been ineffective in curbing access to dial-porn by children. Among other things, it did not prohibit obscene language that clearly can be forbidden under the precedents of this Court; it permitted interstate access to local dial-porn services, as well as to dial-porn services offered over long-distance "900" services; and it obligated telephone companies to block services only if it was "technologically feasible" to do so. *See Record* at H1709 (statement of Rep. Bliley); *Record* at H1712 (Rep. Coats). This proposal also attempted to place the burden of limiting the availability of dial-porn services to children on the telephone companies, not on the purveyors of the services themselves, as should properly be the case.

Moreover, Congress found credit card screening to be an inadequate regulatory safeguard which can be easily circumvented by minors using their own credit cards or those of their parents or by misusing the credit card numbers of others gained from carbon copies or other means. Since the transaction takes place by telephone, minors need only a credit card number, and not the credit card itself.

Finally, Congress found that any alternatives which employed only regulatory mechanisms would guarantee the continued availability of much dial-porn, since the regulatory scheme of the Communications Act gives the Federal government jurisdiction only over interstate calling. This was one reason that the alternative proposed by the Reagan Administration, banning obscenity coupled with regulating the provision of indecent dial-porn, would have been inadequate to solve the problem. No matter what regulatory mechanism was employed, the practical effect would have been to continue the availability of dial-porn within any State that did not itself have a law effectively regulating dial-porn within its borders.

The failure of technological and regulatory alternatives effectively to curtail dial-porn access by children left Congress with no alternative but to consider solutions with more direct First Amendment implications.

II. THE NECESSITY OF DIRECTLY PROHIBITING DIAL-PORN

Obscene commercial speech, like certain other forms of speech, clearly is unprotected by the Constitution, and the Court should reaffirm that holding. The only controversial constitutional question before the Court is how indecent commercial speech transmitted through *one* medium of communications—the telephone—can be effectively regulated to keep children from gaining access to it in a manner consistent with the First Amendment. When the alternatives were examined, Congress found that nothing short of prohibiting obscene and indecent messages transmitted for commercial purposes achieved the goal of effectively curtailing access to dial-porn by children. The statutory prohibition applies only to dial-porn transmitted interstate or in the District of Columbia, and is consistent with the Communications Act scheme applicable to common carriers. However, the practical effect of the statute should be to curb dial-porn transmissions within a State as well, since any dial-porn provider could be prosecuted if a caller could reach its service across State lines.

The Court has alternate means of determining whether the dial-porn statute passed by Congress last year is consistent with the First Amendment. We continue to believe that the statute is a permissible "time, place and manner" restriction, consistent with Court precedents for half a century. After exhaustive examination, Congress determined that nothing less than completely restricting obscene and indecent commercial speech over the telephone would accomplish its goals of effectively curtailing access to dial-porn by children. *See Record* at H1808-H1810 (legal memorandum supporting constitutionality

of dial-porn section of H.R. 5 submitted by Hon. Thomas J. Bliley, Jr.).

Even if the Court rejects that analysis, we believe the remedy in the dial-porn statute also is permissible under the First Amendment test for commercial speech enunciated in *Central Hudson Gas and Electric Corp. v. PSC of New York*, 447 U.S. 557 (1980). *Central Hudson* provides that regulation of commercial expression will pass constitutional muster if (1) the governmental interest is substantial, (2) the regulation directly promotes that interest, and (3) the regulation is no more extensive than necessary to achieve that interest.

In applying either test, the Court must be aware of the unique characteristics of the telephone, as well as the unique limitations that exist on parents' ability to monitor and supervise its use. After considering the similarities, and differences, between the telephone and other communications media, the Court should find under either analysis that the restrictions of the new dial-porn law are narrowly crafted and necessary to achieve the Congressional objective of effectively curtailing children's access to dial-porn.

Many compare the dissemination of commercial messages by telephone with the dissemination of similar messages by radio. There are substantial similarities between the two modes of transmitting messages. A radio station sends out the same message to all sets tuned to that station; a recorded "dial-it" service sends out the same message to anyone dialing a given number. (A live dial-it service varies only in that the exact composition of the message varies; the general content of the message is the same each time.)

The telephone is a ubiquitous tool in today's society. The telephone is an essential link for all citizens with the outside world for emergency and other purposes. Indeed, the Federal government encourages "universal telephone service" through the Communications Act of

1934, as amended, 47 U.S.C. § 151, *et seq.* Unlike radio or any other communications media, the Government encourages each citizen to have a telephone in his or her home and to be able to use it. (Currently, telephones are in nearly 94 percent of American households.) Knowledge of how to use the telephone is deemed essential even for the younger child, and is encouraged especially in the event that an emergency occurs.

Effective parental supervision of a child's use of the telephone is uniquely impossible, due to the insufficient methods of preventing access to dial-it services that were described earlier. If a parent wishes to prevent his or her child from reading certain magazines in the home, he or she need only refuse to bring them into the home. If a parent does not wish for his children to listen to certain radio or television programs, the parent can turn off the set or even lock it away. If a parent wishes to prevent viewing of cable television programs, he or she can request a "lockbox" from the local cable company under the provisions of Section 624(d)(2)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 544(d)(2)(A).

However, Congress found that there is no effective mechanism through which a telephone subscriber can request that his telephone not be able to receive "dial-porn" services. The lack of technological and regulatory alternatives available in the telephone industry effectively to curtail the availability of dial-porn to children makes a prohibition on obscene and indecent telephone communications for commercial purposes the only means of ensuring that this harmful service will not be accessible to children.

CONCLUSION

No technological or regulatory solution is available that would effectively bar access to dial-porn by children. Limiting dial-porn through technological or regulatory means would be ineffective because it would not resolve any problems of dial-porn access by children. Therefore, the only restriction that will effectively limit children's access to dial-porn is that contained in the 1988 statute passed by Congress: a complete prohibition on obscene and indecent language for commercial purposes by telephone.

Any peripheral infringement of dial-porn providers' freedom of expression is outweighed by the Government's compelling interest in effectively restricting minors' exposure to dial-porn. Both this Court and Congress recognize that children are a most precious resource of this Nation, and the state has a legitimate interest in safeguarding them from exposure to speech which is clearly harmful to their well-being. The nature of the harm to children from dial-porn is great, and is not in question. The unique problems associated with limiting access to pornography by telephone make it necessary for the state to ban directly the conduct in question. No other alternative will accomplish the goal.

Wherefore, for the reasons stated above, *amici curiae* members of the United States House of Representatives respectfully request that the judgment of the United States District Court, insofar as it applies to the indecency portion of Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b) (1988), be reversed.

Respectfully submitted,

JOHN J. ADAMS *
2000 Pennsylvania Ave., N.W.
Suite 9000
Washington, D.C. 20006

TERRY L. HAINES
Minority Counsel
U.S. House of Representatives
Committee on Energy and
Commerce
2322 Rayburn House Office
Building
Washington, D.C. 20515
(202) 226-3400

* Counsel of Record

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No. 88-525

In The

Supreme Court of the United States

October Term, 1988

FEDERAL COMMUNICATIONS COMMISSION, ET AL.
Appellants and Cross-Appellees,

vs.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.
Appellee and Cross-Appellant

On Appeal from the United States District Court for the Central District of California

BRIEF AMICI CURIAE OF CITIZENS FOR DECENCY THROUGH LAW, INC., THE CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND REBECCA C., INFANT, BY AND THROUGH HER PARENTS PAULETTE CALLEN AND GARY CALLEN IN SUPPORT OF APPELLANTS AND CROSS-APPELLEES AND MOTION FOR LEAVE TO FILE

BENJAMIN W. BULL
2845 E. Camelback Rd.
Suite 740
Phoenix, AZ 85016
(602) 381-1322

Counsel of Record
Amici Curiae

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

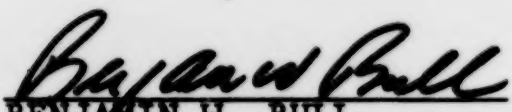
Citizens for Decency through Law, Inc. (CDL), the Christian Life Commission of the Southern Baptist Convention, and Rebecca C., by and through her parents Paulette Callen and Gary Callen hereby respectfully move for leave to file the attached brief amici curiae in this case. The consent of the attorney for Appellants and Cross-Appellees has been obtained. The consent of the attorney for the Appellee and Cross-Appellant was requested telephonically and by correspondence. He failed to respond, so it is assumed that his consent is refused.

The interests of the joint amici curiae is set out below.

In the instant case in the District Court, Appellants and Cross-Appellees did not urge an interpretation of the "indecency" standard consistent with this Court's nuisance rationale for the application of that standard in FCC v. Pacifica, 438 U.S. 726 (1978).

Since it is likely that Appellants and Cross-Appellees may pursue the same course in this Court, it is believed that the brief which amici curiae are requesting permission to file will contain a more complete argument on this constitutional issue. If this argument is accepted, it will be dispositive of this case.

Respectfully submitted,



BENJAMIN W. BULL
Counsel for Citizens
for Decency through
Law, Inc., the
Christian Life
Commission of the
Southern Baptist
Convention, and Rebecca
C., by and through her
parents Paulette
Callen and Gary Callen.

2845 E. Camelback Rd.
Suite 740
Phoenix, AZ 85016
(602) 381-1322

INTEREST OF AMICI CURIAE

Interest of CDL

Citizens for Decency through Law, Inc. (CDL) is a non-profit legal organization founded in 1957 by attorney Charles H Keating, Jr. Mr. Keating was a member of the 1970 Presidential Commission on Obscenity and Pornography. CDL exists to assist public officials in the enforcement and drafting of constitutional obscenity and pornography laws. It also provides legal assistance to victims of pornography such as joint amici curiae, four-year-old Rebecca C. CDL also provides public information on legal and social issues related to pornography and on sexual exploitation and victimization by pornographers. CDL has a legal staff of attorneys practicing exclusively in the

First Amendment/pornography area. CDL's attorneys drafted legal memoranda in support of the amendments to 47 U.S.C. section 223(b) of the Child Pornography and Obscenity Enforcement Act of 1988, the subject of the instant litigation. CDL's memoranda were published in the Congressional Record on three separate occasions. See 134 Cong. Rec. H1691 (April 19, 1988); 133 Cong. Rec. S16796 (December 1, 1987); 132 Cong. Rec. S14049 (September 27, 1986). CDL has filed over fifty briefs in the United States Supreme Court and has participated in trials and appeals in more than 40 states. It has over 120 affiliated chapters across the nation representing over 100,000 supporters.

CDL is profoundly concerned about the victimization and exploitation of children by commercial telephone pornog-

raphers. It believes that in order to ensure a decent and healthy society, proscriptions against "indecent" and "obscene" commercial telephone recordings under 47 U.S.C. section 223(b) must be upheld.

Interest of the Christian Life Commission of the Southern Baptist Convention

The Christian Life Commission of the Southern Baptist Convention is an agency of the Convention which assists Southern Baptists in understanding the moral demands of the Christian faith and helps Southern Baptists apply Christian principles to moral and social problems. The Southern Baptist Convention is the largest Protestant denomination in the United States. It has more than 37,000 member churches with approximately 14.8 million members.

On June 16-18, 1987, at its meeting in St. Louis, Missouri, the South-

ern Baptist Convention enacted its "Resolution on Pornography." Among other things, it recognized that the "primary users of" pornographic telephone recordings "appear to be America's teenagers." It called upon all Southern Baptists to oppose the exploitation of America's children by commercial telephone pornographers. The Resolution called upon Congress to enact the very legislation challenged in the instant appeal.

Interest of Rebecca C., Infant

Rebecca C. is a four-year-old female child who was raped by a 12-year-old male child after he was exposed to two-and-one-half hours of "indecent" and "obscene" dial-a-porn recordings. The 12-year-old boy accessed these recordings while at church on a telephone in a pastor's study.

The boy was incited by these sexually explicit recordings to act out what the recorded female voice urged him to do; he compelled the four-year-old child to orally copulate him. In addition to her physical injuries, Rebecca C. was emotionally and psychologically traumatized. Rebecca C., by and through her parents, Paulette and Gary Callen, has filed a $10 million suit against Pacific Bell, and the two commercial dial-a-porn vendors accessed by the 12-year-old boy. This suit, entitled Brian T., et. al. v. Pacific Bell (No. A041423) is currently pending in the Court of Appeal of the State of California.

SUMMARY OF ARGUMENT

Where a sufficient need exists, this Court has upheld limitations on

certain classes of nonobscene speech, including "indecent" speech. This is particularly true where, as here, "indecent" recordings are readily available for adults from alternate sources. Like the radio in F.C.C. v. Pacifica, the telephone is sufficiently intrusive and pervasive to support Congress's proscription on "indecent" recordings. Such a restriction strikes a balance, in which children are protected while adults still have access from other sources (i.e., "over the counter"). They are not reduced to hearing only what is fit for children.

Under New York v. Ferber, 47 U.S.C. section 223(b) is not substantially overbroad. Applied to the commercial telephone medium, the "indecency" standard regulates a central core of constitutionally regulable conduct.

By its very nature, the dial-a-porn industry amounts to "telephone broadcasting." Limited to this medium, the statute does not reach a substantial number of impermissible applications.

"Obscenity" is unprotected regardless of the medium of communication, including the telephone. If telephone pornographers choose to do business in multiple federal districts, they are constitutionally subject to liability in each district under varying community standards.

LAW AND ARGUMENT

I. CONGRESS MAY PROHIBIT INDECENT DIAL-A-PORN RECORDINGS. IT IS NOT LIMITED TO A BAN ON OBSCENE RECORDINGS.

A review of this Court's decisions in the First Amendment area shows great

deference to the values of free speech. It is also clear that where there is a compelling need to protect the public -- and particularly children -- from injurious speech, the Court has not embraced an absolutist position.[1] On the contrary, where it is shown that adults may easily obtain pornographic speech from other sources, this Court has evidenced a willingness to protect the privacy of unconsenting adults and the welfare of children by restricting pornographer's access to a particular medium. Indeed, where the need is sufficient, the Court has recognized

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[1] The absolutist position would extend First Amendment protection to all speech, regardless of the harm, including child pornography. See testimony of Barry Lynn, Legislative Counsel, American Civil Liberties Union, before the Attorney General's Commission on Pornography, June 20, 1985, Washington, D.C. hearing.

certain categories of speech which are either unprotected or enjoy only limited protection under the First Amendment. The regulation of "indecent" dial-a-porn recordings should be such a category.

A. When There is Sufficient Need This Court Has Regularly Limited Nonobscene Expression.

In the landmark case F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), this Court defined the word "indecent" as "nonconformance with accepted standards of morality." It is a "shorthand term for patent offensiveness." Id. at 740 n.15. This definition obviously does not coincide with the three-part definition of "obscenity" found in Miller v. California, 413 U.S. 15 (1973).

This Court, of course, has never limited government restrictions on speech to the obscenity standard. For example, this Court has upheld restrictions on all of the following types of speech: false advertising, speaking a prayer in a public school, libel, slander, speaking words which amount to a conspiracy or an obstruction of justice, sedition, yelling "fire!" in a crowded theatre, using words which constitute offering a bribe, words that threaten social harm because they advocate illegal acts, words (from a loudspeaker) at 3:00 a.m. in a residential neighborhood, speaking in contempt of court, committing perjury under oath, television cigarette advertisements, saying words which have been classified (e.g., secret) by the government, copyright violations, pretrial publicity which might interfere with a defen-

dant's opportunity to secure a fair trial, U.S. government employees engaging in political speech (Hatch Act), sexually explicit material which is harmful to minors, nonobscene sexually explicit movies shown in violation of a zoning ordinance, child pornography, and finally, "indecent" speech.[2] Thus, the broad contention that government restrictions on expression are limited to the obscenity standard is quite incorrect. Obviously the regulation of sexually-oriented expression has by no means been limited to that standard, although the degree of permissible regulation has varied with the circumstances.

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[2] See, "Where Do You Draw the Line?, ed. Victor B. Cline (Brigham Young University Press, 1974).

The application of the "indecency" standard to dial-a-porn is supported by this Court's analysis of the First Amendment, which accords some varieties of speech (e.g., "indecent" speech) less protection than others.[3] The Court's rulings that certain types of expression are entitled to little or no protection under the First Amendment find their modern beginnings with Chaplinski v. New Hampshire, 315 U.S. 568 (1942), where the Court upheld a "fighting words" statute under which

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[3] See, L. Tribe, American Constitutional Law, § 12-18 (1978); Krattenmaker & Powe, "Televised Violence: First Amendment Principles and Social Science Theory," 64 Va. L. Rev. 1123, 1207-1212 (1978); Stone, "Restrictions of Speech because of its Content: The Peculiar Case of Subject Matter Restrictions," 46 U of Chi. L. Rev. 81 (1978); Note, "Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech," 4 Hastings Const. L. Quarterly 321, 344-54 (1977); "The Supreme Court, 1975 Term," 90 Harv. L. Rev. 58 200-205 (1976).

Chaplinski had been convicted for calling a policeman "a god damned racketeer" and a "damned fascist." Id. at 569. Justice Murphy's rationale for upholding the statute against a First Amendment attack is set forth in the following excerpt from the opinion:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-72.

In essence the Court has held that differing degrees of protection are afforded different classes of speech. Speech protected in some contexts may in others be so harmful, or of so little value, that it can be regulated because the harm to society outweighs the expressive interests. Thus, First Amendment protection "often depends on the content of the speech." Young v. American Mini Theatres, Inc., 427 U.S. 50, 66 (1976). Furthermore, as Justice Stevens has stated, "the First Amendment affords some forms of speech more protection from governmental regulation than other forms of speech," New York v. Ferber, 458 U.S. 747, 781 (1982) (Stevens, J. concurring), and the context of speech may determine whether or not it is protected. F.C.C v.

Pacifica, 438 U.S. at 747-48.[4] For instance see: Rowan v. Post Office Department, 397 U.S. 728 (1970) (banning erotic material from the mails at recipient request); C.B.S. v. Democratic National Committee, 412 U.S. 94 (1973)(upholding network refusal to accept commercial advertising); Lehman v. Shaker Heights, 418 U.S. 298 (1974) (upholding policy of accepting commercial advertisements but refusing political advertisements on city-owned bus

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[4] More recently, in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985) this Court observed that "[w]e have long recognized that not all speech is of equal First Amendment importance . . . Certain kinds of speech are less central to the interests of the First Amendment than others..." Id. at 758-59 n.5 "Indecent speech," unlike speech on issues of public concern, is not at the "heart" or the "core" of the First Amendment. Frisby v. Schultz, 487 U.S. ____, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), Hustler Magazine v. Falwell, 485 U.S. ____, 108 S.Ct. 876, 99 L.Ed. 41 (1988).

line); Greer v. Spock, 424 U.S. 828 (1976) (barring political speakers from a military base); Jones v. North Carolina Prisoners Union, 433 U.S. 119 (1977) (banning in-prison solicitation of membership in a prisoners' union); Young v. American Mini Theatres, supra, and Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)(placing zoning restrictions on the location of adult theatres); F.C.C. v. Pacifica, supra; Board of Education v. Pico, 457 U.S. 853 (1982)(certain books may be removed from a high school library because of their vulgarity); New York v. Ferber, supra (banning non obscene sexually explicit depictions of minors); Ginsberg v. New York, 390 U.S. 629 (1968) (banning distribution to minors of nonobscene material which is "harmful to minors");

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)(upheld restriction on "indecent" sexually suggestive language in a political speech by high school student); City of Newport v. Iacobucci, 479 U.S. 92 (1986)(upheld city ordinance banning nonobscene nude or nearly nude dancing in bars).

B. Section 223(b) is Not Unconstitutionally Overbroad on its Face or as Applied Because it Regulates a "Central Core of Constitutionally Regulable Conduct."

Sable Communications of California, Inc. ("Sable") argues that 47 U.S.C. § 223(b) is overbroad both facially and as applied to Sable and its affiliates.[5] The statute, Sable argues,

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[5] Sable has provided no evidence that would support this Court's finding that the statute is overbroad "as applied." This is a pre-enforcement challenge, which necessitates a conclusion that the government has never applied this law to Sable or anyone else.

is overbroad because it regulates outside of the broadcasting context, because it fails to define "indecent" in the statute itself, and because supporting authority cited in the legislative history is "inapplicable." To the contrary, section 223(b) is constitutional because it regulates a "central core of constitutionally regulable conduct," and because it thus survives "substantial overbreadth" analysis. See infra at pp 29-47. Sable's reasoning fails because it leaps across critical legal issues in a sprint to advance the conclusion that "indecency" is not subject to regulation in the telephone medium. For proper analysis this issue must be broken down into several related issues. (1) Does the term "indecent" define a course of conduct subject to the government's regulation?

(2) Did Congress intend that the term "indecent" be applied consistently with the Court's mandates? (3) Can the telephone medium be regulated using the "indecency" standard? (4) Does the statute survive "substantial overbreadth" analysis?

1. Congress intended that the term "indecent" be applied consistently with the Supreme Court's mandate in F.C.C. v. Pacifica, where the Court held that "indecency" defined a course of conduct subject to government regulation.

Sable apparently concedes that Congress intended that the term "indecent" in section 223(b) be defined and applied consistently with the Supreme Court's opinion in F.C.C. v. Pacifica, supra. Sable argues, however, that Pacifica is inapplicable, and that no circumstances exist to permit the regulation of commercial "indecency" in the telephone medium.

An analysis of Pacifica and related decisions is necessary to determine whether the term "indecent" defines a course of conduct subject to regulation by the government. In Pacifica, the issue before the Court was whether the FCC had the power to regulate a radio broadcast that was "indecent" but not obscene under 18 U.S.C. § 1464. As stated another way by the Court, whether "when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power" depends "on proof that the pig is obscene." 438 U.S. at 750-51.

The controversy in Pacifica related to the broadcast of the George Carlin "Filthy Words" monologue by a New York radio station at approximately 2 o'clock in the afternoon. This broadcast contained very graphic language relating to excretory and sexual activi-

ties or organs. The monologue was included by the Court in an appendix to its decision. 438 U.S. at 751-55. Reacting to a complaint concerning the broadcast, the FCC issued a declaratory order granting the complaint; finding that the language as broadcast was indecent as prohibited by 18 U.S.C. § 1464; and warning Pacifica that sanctions could have been imposed by the FCC, and might be imposed in the future, if additional complaints were received. 438 U.S at 730-32.

The ultimate ruling by the court in Pacifica was that the FCC did have the power to regulate an "indecent" broadcast, and that the government's power in this context goes beyond the proscription of that which is obscene.[6] The Court stated several

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[6] The Court noted that "each medium

FOOTNOTE CONTINUED ON NEXT PAGE

reasons for its decision. First:

> [T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.

438 U.S. at 748 (Emphasis added).[7]

FOOTNOTE 6 CONTINUED
of expression presents special First Amendment problems," and that "of all forms of communication, it is broadcasting that has received most limited First Amendment protection." 438 U.S. at 748.

[7] See also, 438 U.S. at 731 n.2, where the Court elaborated on the pervasive nature of broadcasting, its availability to unsupervised children, and its invasion of the home. The Court recognized the similarity between offensive broadcasts and "harassing phone calls," stating:

> One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity to avoid a harm that has already taken place.

438 U.S. at 749 (Emphasis added).

Further, in support of its ruling the Court stated that:

> Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant.

438 U.S. at 749 (Emphasis added).[8] In addition, the Court recognized the governmental interest in the "well-being of its youth" and "in supporting 'parents' claims to authority in their own household'," and "[t]he ease with which children may obtain access to broadcast material." 438 U.S. at 749-50. Finally, the Court was clear that its decision (and the FCC's) "rested entirely on a nuisance rationale under

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[8] Similarly, most (if not all) first grade children can dial the telephone, and indecent dial-a-porn has the same instantaneous effect of enlarging a child's vocabulary and worse.

which context is all-important," requiring "consideration of a host of variables." 438 U.S. at 750. The Court rejected the contention that its ruling would "reduce adults to hearing only what is fit for children," violating the principle expressed in Butler v. Michigan, 352 U.S. 380 (1957). To the contrary, the Court stated that adults could hear this material through other mediums of communication. 438 U.S. at 750 n.28.

The Pacifica Court also defined the term "indecent" for purposes of its rejection of the overbreadth and First Amendment challenges. The Court referred in its opinion to the FCC's definition of "indecent," which had been used by the Commission in the issuance of its order regarding the "Filthy Words" broadcast. The FCC had defined "indecent" as follows:

> [L]anguage that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.

438 U.S. at 732 (Emphasis added).

Elaborating, the Court stated:

> It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern.

438 U.S. at 743 (Emphasis added).[9]

In addition to this clear indication of

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[9] The Court also cited an earlier decision relating to 18 U.S.C. § 1461, where Justice Harlan commented that "indecency" is a "shorthand term for 'patent offensiveness.'" 438 U.S. at 740 n.15 (quoting Manual Enterprises v. Day, 370 U.S. 478, 482 (1962)).

the types of conduct that would fall within the regulation of "indecency," the Court also identified as crucial to its decision that:

> [T]he Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

438 U.S. at 750.[10]

In applying the "indecency" prohibition to the facts before the Court in Pacifica, the Court held that 18 U.S.C. § 1464 was not overbroad. The

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10 See also, 438 U.S. at 732 n.6, noting the statement of Commission Chairman Wiley that "'indecency' is not an inherent attribute of words themselves; it is rather a matter of context and conduct."

very same facts and circumstances before the Court in Pacifica are present in a possible application of 47 U.S.C. § 223(b).

This Court's decision in Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) is also relevant on the issue of overbreadth. The issue in Bethel was "whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly." Id. at 677. The Court held:

> We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.

Id. at 685 (Emphasis added).

The Court stated several reasons for its ruling, rejecting the student's claims that the school's disruptive-con-

duct rule was vague and overbroad. First, the Court noted that even the House of Representatives of the United States prohibits "indecent" language during debate and other proceedings, and that "Senators have been censured for abusive language directed at other Senators." Id. at 682. The Court cited Ginsberg v. New York and Board of Education v. Pico for the proposition that:

> This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children.
>
> * * *
>
> These cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis to protect children -- especially in a captive audience -- from exposure to sexually explicit, indecent, or lewd speech.

478 U.S. at 684 (Emphasis added). Finally, the Court cited Pacifica for the authority that the Court has "recognized an interest in protecting minors from exposure to vulgar and offensive spoken language." Id. Therefore, the Court in Bethel reaffirmed its willingness to restrict the rights of speakers where the speech is "indecent," and where the speaker's audience includes children.

2. The "indecency" standard in section 223(b) is not overbroad as used in the context of the commercial telephone medium.

Having shown that section 223(b) can be construed to regulate a definable and specific course of conduct consistent with Pacifica, the issue remains as to whether the telephone medium is sufficiently comparable to the "broadcast" at issue in Pacifica

to justify the similar regulation in this context.

The Court left this issue open in Pacifica, where it stated in regard to "context" that "differences between radio, television, and perhaps closed-circuit transmission, may also be relevant." 438 U.S. at 750. Indeed, this Court has repeatedly recognized that "each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 557 (1975). Each communication medium is subject to its own specific set of rules. Pacifica at 747; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-503 (1952). And the resolution of each case ultimately must depend upon its own particular facts. Erznoznik v. City of Jacksonville, 422 U.S. 205

209 (1975). The Court emphasized in Pacifica that of all media, the broadcast medium is given the least protection under the Constitution. 438 U.S. at 748. The similarities between the radio broadcast medium in Pacifica and the telephone dial-a-porn medium are overwhelming. Sable does not provide any blocking, subscription, credit card or other child screening technologies. Any child can access Sable's telephone recordings anytime and virtually anyplace.

It is important to recognize that Sable's dial-a-porn business does not involve situations in which one adult calls another to engage in a private and spontaneous conversation. To the contrary, Sable's Complaint, para. 6-7 alleges:

> 6. "Dial-It," or "976 Information Access Service" ("976-IAS"), is now offered by the former Bell

operating companies, such as Pacific Bell. Such service allows private information to callers for a fee. Nationwide, these facilities are accessible only by dialing the prefix "976," which provides connection to unique access lines.

7. Calls to "976 IAS" numbers are routed over specialized interoffice trunks that are designed to handle large volumes of calls; a similar service cannot be handled with ordinary business lines. The network design of "976 IAS", by interconnecting telecommunications and computer equipment and facilities, permits hundreds of persons hourly to voluntarily access a prerecorded message by dialing a designated telephone number. The common carrier telephone companies assign these specialized lines to providers such as SABLE . . . .

(Emphasis added).

The broadcast nature of this medium is abundantly clear from previous litigation over Sable's commercial dial-a-porn businesses. In Carlin Communications, Inc. v. F.C.C., 749 F.2d 113, 114 (2nd Cir. 1984) ("Carlin

I"), the Court observed about Sable's business:[11]

> Carlin Communications, Inc. provides a telephone "service," colloquially called "dial-a-porn," to local and long distance callers at ordinary rates. The callers hear prerecorded messages, which change several times daily as in the case of weather or sports results, describing actual or simulated sexual activity apparently in explicit terms. A dial-it service can receive up to 50,000 calls per hour to an individual number, and , rather incredibly, 800,000 calls per day were made to dial-a-porn in May, 1983; 180,000,000 calls in the year ending February, 1984. Dial-a-porn, accessible by calls to or in the Metropolitan New York area codes 212, 516, and 914, all to the 976 exchange, was far more popular than the horserace results, the second most popular dial-it service,

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[11] In Sable's Complaint, para. 8, it is alleged as fact that Sable and Carlin Communications, Inc. are affiliated corporations, at least since November, 1983.

> which received 79,000 calls per day or 29,000,000 per year. Eighty percent of dial-a-porn calls are local, and twenty percent long distance.

(Emphasis added). In Carlin Communications, Inc. v. F.C.C., 787 F.2d 846, 848 (2d Cir. 1986) ("Carlin II"), the Court found as fact:

> We note that for the six months ending April, 1985, dial-a-porn calls appear to have leveled off at 6 to 7 million per month . . . .

(Emphasis added). In Carlin Communications, Inc. v. F.C.C., 837 F.2d 546, 550 (2d Cir. 1988) ("Carlin III"), the Court found:

> The Commission released its Third Notice of Proposed Rulemaking on July 18, 1986, some three months after our decision in Carlin II. The Commission first observed that total calling volume to the New York Telephone and New England Telephone and Telegraph Companies' ("NYNEX") "dial-it" system had declined from 471 million calls in 1984 (1.29 million per day) to 159 million calls

> in the months of January to April 1985 (435,000 per day). Of these, 97 million were made to "adult entertainment numbers" in 1984 (266,000 per day), while 26 million (72,000 per day) were made to such numbers between January and April 1985. In fact, NYNEX had reported that, during the first four months of 1985, total MAS calling volume had risen to 1.32 million calls per day while adult entertainment calls had dropped to 218,000 per day.

(Emphasis added). Finally, in Carlin v. Mountain States Tel. & Tel., 827 F.2d 1291, 1294 (1987), the Ninth Circuit found:

> The technology of that network differs fundamentally from that of basic phone service. As pointed out above, individuals do not speak to each other on the 976 lines. Instead, "over 7,900 callers can be connected simultaneously to the same recorded message." Under these circumstances the telephone is serving as a medium by which Carlin broadcasts its messages. The phone company resembles less a common carrier than it does a small radio station.

(Emphasis added).

These factual findings regarding Sable, together with the allegations in its Complaint, do not support its claim that Pacifica is inapplicable and that "indecent" material cannot be regulated in the telephone medium. The Ninth Circuit's conclusion that the phone company resembles "a small radio station" appears correct where, as here, a dial-a-porn service: (1) offers a pre-recorded sexually explicit message; (2) is available simultaneously on one number to 7,900 or more callers; and (3) has reached several hundred thousand callers per day and tens of millions of callers per year.[12]

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[12] Considering these facts, there are probably many traditional broadcast radio stations who would be pleased to reach 200,000 or more listeners per day and 100 million per year.

Most if not all of the concerns supporting the ruling in Pacifica are present in the instant case. First, the telephone has certainly established a uniquely pervasive presence in the lives of Americans, and these calls can confront a citizen (including children) not only in public but in the privacy of the home. Amici Rebecca C. was raped by a 12-year-old boy after he accessed the recordings for two and one half hours at a church telephone. So we know that Sable's service, like traditional broadcasting, is uniquely accessible to children who are able to dial the seven-digit numbers. Moreover, while in Pacifica there was no evidence that the radio station advertised, there is evidence here that Sable and others advertise extensively, and that children call these numbers and have been harmed by them. Finally,

as in Pacifica, section 223(b) must be construed under a nuisance rationale where context and all variables must be considered. And as in Pacifica, section 223(b) does not reduce the adult population to what is only fit for children, contrary to Butler v. Michigan, supra. Such materials will continue to be available to adults through other mediums of communication.

3. As construed in its application to the regulation of "indecent" telephone services, section 223(b) is not substantially overbroad.

This Court's overbreadth cases show that section 223(b) is not substantially overbroad. In Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), this Court reversed the Ninth Circuit's decision to invalidate the Washington obscenity statute in its

entirety on "overbreadth" grounds.[13] The Court discussed the proper analysis for an "overbreadth" challenge, particularly one raised prior to the effective date or enforcement of the law. In support of its holding, this Court cited the following rules governing federal courts in the context of a facial challenge to a statute:

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[13] In a pre-enforcement challenge, the Ninth Circuit invalidated the statute based on what it considered to be an improper definition of "prurient interest." This Court ruled that it would be improper to define "prurience" in terms of "lust," if the term "lust" referred to normal and healthy sexual desires. However, the Court stated further:

> Even if the statute had not defined prurience at all, there would have been no satisfactory ground for striking the statute down in its entirety because of invalidity in all of its applications.

472 U.S. at 505.

> We call to mind two of the cardinal rules governing the federal courts: "'[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"

Id. at 501 (quoting United States v. Raines, 362 U.S. 17, 21 (1960)). The Court also stated:

> Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.

472 U.S. at 502. Finally, and most important, the Court ruled that the Ninth Circuit erred in holding the Broadrick v. Oklahoma, 413 U.S. 601 (1973), "substantial overbreadth" requirement inapplicable in a case where "pure speech" is at issue. 472 U.S. at 503 n.12 (citing New York v. Ferber, 458

U.S. 747, 772 (1982)). In New York v. Ferber, relied on by the Court in Brockett, the Court upheld a New York statute prohibiting depictions of sexual performances by children (i.e., child pornography). The statute was attacked on overbreadth grounds, based on the contention that it would prohibit the dissemination of material which is not legally obscene. In rejecting this attack, and in holding that child pornography need not be obscene to be proscribed, the Court reaffirmed its holding in Broadrick v. Oklahoma, stating:

> [W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

458 U.S. at 770 (quoting Broadrick, 413 U.S. at 615) (Emphasis added).

In rejecting the overbreadth challenge, this Court stated that the overbreadth would not be "substantial" if the statute covered a "whole range of easily identifiable and constitutionally proscribable" conduct (458 U.S. at 770 n.25); if the statute regulated a "central core of constitutionally regulable conduct" (458 U.S. at 771 n.26); or unless "it reaches a substantial number of impermissible applications." (458 U.S. at 771).[14] Finally, if the overbreadth is not "substantial," the Court expressed its preference for

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[14] The Court also recognized that:

> It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.

458 U.S. at 772 n.27 (quoting Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 859 (1979)).

curing whatever overbreadth may exist in a statute "'through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.'" 458 U.S. at 773-74 (quoting Broadrick, 413 U.S. at 615-16).

This position was reemphasized recently in two rulings of this Court, New York State Club Assn. v. City of New York, 487 U.S. ____, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)(upholding a New York City law forbidding discrimination by places of "public accommodation, resort or amusement"); and Frisby v. Schultz, 487 U.S. ____, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (upholding a picketing ordinance prohibiting such activity in front of a residence or dwelling). In New York State Club Assn., 101 L.Ed. 2d at 16-17 (quoting Broadrick v. Oklahoma) the Court

stated concerning the facial overbreadth challenge:

> A law is constitutional unless it is "substantially overbroad." . . . To succeed in its challenge, appellant must demonstrate from the text of the law and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally.

(Emphasis added). In Frisby, the Court discussed the "plain error" of the Ninth Circuit in Brockett v. Spokane Arcades, and stated concerning Brockett and similar cases:

> To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that it will be interpreted to avoid constitutional difficulties.

101 L.Ed.2d at 430. In Frisby, the Court gave the ordinance a narrow and constitutional construction, refusing to address allegedly unconstitutional

hypothetical applications, and thus rejecting the facial overbreadth challenge. These two timely decisions obviously reaffirm the "substantial overbreadth" doctrine, indicate that it is Sable's burden to demonstrate "substantial overbreadth," and reaffirm the principle that the statute at issue will be interpreted narrowly by this Court to avoid constitutional difficulties.[15]

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[15] See also, L. Tribe, American Constitutional Law, § 12-88 (1988), where he states:

> Implicit in overbreadth analysis is the notion that a law should not be voided on its face unless its deterrence of protected activities is substantial.

Further:

> The key development has been the Court's greater reluctance to strike a law down altogether because of its potential to deter protected expression, and its greater willingness to allow state courts to narrow statutes in the application process.

As in Ferber, the matter before this Court is one where the statute's "legitimate reach dwarfs its arguably impermissible applications." 458 U.S. at 773. As previously discussed, Sable's telephone business is one which is currently available to millions of callers (adults and children), who can simultaneously obtain access to these recordings across the country, the content of which was recently described by the Ninth Circuit Court as "smut" and "salacious." Carlin Communications, Inc. v. Mountain States Tel. & Tel., 827 F.2d at 1292. Moreover, Congressional intent is clear that the "indecency" proscription of the statute is to be applied consistently with Pacifica and other relevant precedents. As so construed, section 223(b) will only proscribe "indecent" material defined as: "language that describes

sexual or excretory organs and activities, in terms patently offensive as measured by contemporary community standards for the . . . [telephone] medium." 438 U.S. at 732. In addition, because Pacifica upheld the "indecency" standard based on a nuisance rationale where context is all-important, section 223(b) must be applied considering the "host of variables" surrounding the particular telephone transmissions at issue. As so construed, section 223(b) cannot be found substantially overbroad, and whatever overbreadth may possibly exist should be dealt with in the future on a case-by-case basis relating to particular factual situations.

C. Section 223(b) is Not Directed at a Particular Viewpoint. It Proscribes Only the Mode or Form of Expression, Not the Ideas the "Indecent" Language May Purport to Convey.

It is important to recognize that section 223(b) is not directed at a particular viewpoint. It proscribes only the mode or form of expression, not any ideas the "indecent" language may purport to convey. If the speaker is concerned with ideas, he can escape penalty by expressing them in some other form. This Court has recognized that content is separable from form and that other modes of expression are virtually always available. Restrictions on "indecent" speech do not preclude advocacy of any ideas such speech might otherwise convey. For example, prohibitions on "indecent" telephone recordings may be compared with a lawyer who, in open court, addresses the judge in "indecent" terms. Rules against that sort of speech will undoubtedly be enforced by the judge (holding lawyer in contempt). The

Court recognizes that other more acceptable means of objecting to the judge are available and the lawyer must use them. As the Court stated in Pacifica:

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communications. There are few, if any, thoughts that cannot be expressed by the use of less offensive language . . ..

438 U.S. at 743 n.18.

D. Where the Interests of Children are at Stake the Government is Fully Justified in Regulating Nonobscene Speech.

Since March of 1983, when dial-a-porn was first commercially marketed, countless children have been exposed to it. It constitutes an attractive nuisance in every home in America where children are present. Indeed, there is no completely effective way to prevent

children from being exposed to "indecent" dial-a-porn so long as it is lawfully and commercially marketed.

This Court has repeatedly held that where the interests of children are at stake the government is fully justified in regulating nonobscene material. This significant governmental interest in the protection of minors has been identified in numerous cases. See, Prince v. Massachusetts, U.S. 158, 168 (1944) ("[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens"); New York v. Ferber, 458 U.S. at 756-57 ("a state's interest in 'safeguarding the physical and psychological well-being of a minor'" is "compelling" and justifies banning nonobscene sexually explicit depictions of minors);

F.C.C. v. Pacifica, 438 U.S., at 749 (government interest in the "well-being of its youth" sufficient to ban all "indecent" broadcasting to children, as well as adults).

In Ginsberg v. New York, supra, this Court upheld a ban on the distribution of nonobscene sexually explicit material to children. The prohibition on distribution of such "indecent"[16] material to children is supported by the exact same interest present when "indecent" dial-a-porn is exposed to children. The "governments' interest in the 'well-being of its youth' and in supporting '[parents'] claim to authority in their own house-

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16 "Bookstores and motion picture theatres for example, may be prohibited from making indecent material available to children." F.C.C. v. Pacifica Foundation at 749 (explaining Ginsberg)(Emphasis added).

hold' justified the regulation of otherwise protected expression." Pacifica at 749; Ginsberg at 639-40. The Court in Ginsberg elaborated on these compelling interests. There were two governmental interests which justified limitations on the availability of sexually explicit ("indecent") material to children. First, the Court noted that "constitutional interpretation has consistently recognized that the parents' claim to authority in their household to direct the rearing of their children is basic in the structure of our society," and that parents and others responsible for children's well-being "are entitled to support of laws designed to aid discharge of that responsibility." Id. at 639. Second, the Court stated that "government has an independent interest in the well-be-

ing of its youth." Id. at 640. The Court declared that:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.

Id. Indeed, Justice Stewart, in his concurring opinion in Ginsberg, provided an additional theoretical justification for stricter regulation of dissemination of sexually explicit "indecent" material to minors.

> I think a State may possibly determine that, at least in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that

> full capacity for individual choice which is the presupposition of First Amendment guarantees.

Id. at 649-50 (Stewart, J., concurring). As the Court more recently stated, the government's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." New York v. Ferber at 756-57 (Emphasis added).

Given the nature of the commercial dial-a-porn problem, "society's right to 'adopt more stringent controls on communicative materials available to youths than on those [only] available to adults'" is fully warranted. Pacifica at 757 (Powell, J. concurring)(quoting Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975)); See also, Miller v. California, 413 U.S. at 36 n.17; Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 690

(1968); Jacobellis v. Ohio, 378 U.S. 184, 195 (1964).

E. Butler v. Michigan Does Not Foreclose a Prohibition on Commercial "Indecent" Telephone Recordings. Adults Can Easily Obtain Such Recordings Elsewhere.

Butler v. Michigan, 352 U.S. 380 (1957), is cited by Sable as foreclosing the instant statute since it forbids Congress from reducing adults to hearing only what is suitable for minors. An analysis of Butler shows that it is not a bar to an "indecency" proscription in the telephone medium. Butler can readily be distinguished from the instant case.

In a brief opinion, the Court in Butler struck down a criminal conviction under a manifestly overbroad Michigan statute that forbade the publication, sale, or other distribution of any publication, writing, picture:

> or other thing, including any recordings, containing obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. . .

Id. at 381. The Court properly ruled that the law was overbroad and "not reasonably restricted to the evil with which it is said to deal." Id. at 383.[17]

The more recent Pacifica Court limited the Butler case by distinguishing it. In a real sense, of course, Pacifica bans the broadcast of "indecent" material to adults as well as children. However, the Court ruled that unlike Butler, the F.C.C.

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[17] It is significant to note that Michigan had another statute specifically proscribing the distribution of erotic materials to minors, but that statute was not before the Court. Butler at 383.

order did not "reduce adults to hearing only what is fit for children" because adults "may purchase tapes and records or go to theatres and nightclubs to hear these words." Pacifica at 750 n.28; and see Powell, J. (concurring) at 760 ("the Commission's holding does not prevent willing adults from purchasing Carlin's ["indecent"] records, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion"). Clearly, this analysis is squarely applicable to "indecent" recordings heard over the telephone. They are easily available to adults from other sources and their removal from the telephone (where they are exposed to children) would not "reduce adults to hearing only what is fit for children." Indeed, this Court itself analogized "indecent" broadcasting with

"indecent" telephone language, stating that neither is given "constitutional immunity" to "avoid a harm that has . . . taken place." Id. at 749. The Court cited as justification for its holding the need for newly enacted Congressional legislation against "obscene or profane" telephone language. Id. at 749 n.27.

It is essential to remember that the Butler statute prohibited the distribution of all material "unsuitable" for minors, no matter what the source or media. It made it impossible for adults to obtain the material anywhere in the state. As in Pacifica, the dial-a-porn prohibition would deal only with one medium which is uniquely hurtful to children. As Justice Powell stated in his Pacifica concurrence:

In most instances, the dissem-

> ination of this kind of degrading speech to children may be limited without also, limiting willing adults access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access . . .. The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast [or telephone] media . . .. [B]oth adults and unsupervised children are likely to be in the broadcast [or dial-a-porn] audience, and the broadcaster cannot reach willing adults without also reaching children.

Id. at 758-59 (Powell, J. concurring) (Emphasis added). Justice Powell went on to state that "[t]his, as the Court emphasizes, is one of the distinctions between" such media and others "justifying a different treatment . . . for First Amendment purposes." Id.

As in Pacifica, the prohibition of "indecent" dial-a-porn involves a

limited form of regulation of a single medium whose adult and youth audiences cannot be physically separated. Butler, on the other hand, applied to all media and embraced a wide-ranging (and vaguely defined) subject matter. Moreover in Butler, dissemination of the materials to children could generally be controlled at the point of distribution without denying access to willing adults. This is impossible with broadcast radio (as in Pacifica) and dial-a-porn.

II. CONGRESS MAY PROHIBIT OBSCENE DIAL-A-PORN RECORDINGS.

Without question, obscene speech is not protected by the First Amendment. Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); Miller v. California, 413 U.S. 15 (1973). Hence, the government may lawfully prohibit its distribution, whether telephon-

ically or through other media. Kaplan v. California, 413 U.S. 115 (1973). See also, United States v. Lampley, 573 F.2d 783 (3rd Cir. 1978)(upholding constitutionality of pre-1983 47 U.S.C. § 223); 50 A.L.R. Fed. 525

The Ninth Circuit Court of Appeals in Carlin Communications v. Mountain States Tel. & Tel., 827 F.2d at 1294 ruled that a telephone company was subject to criminal prosecution under state obscenity laws for choosing to carry dial-a-porn. "Mountain Bell faces . . . potential criminal liability for carrying Carlin's messages under state obscenity laws."

Further, the fact that Sable is subject to violations in multiple communities with varying community standards does not vitiate the statute. This Court dealt with this precise issue in

Hamling v. United States, 418 U.S. 87 (1974). In Hamling, the Court contemplated that conduct overlapping into multiple judicial districts subjected obscenity violators to varying local standards, depending on the locality of trial. In language squarely on point:

> The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the states for violations of states' obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions.

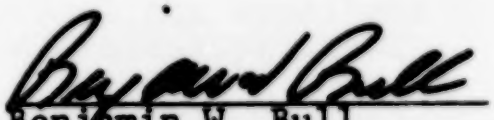
Id. at 106. And see Miller v. California, 413 U.S. at 24, 32; United States v. Sandy, 506 F.2d 210, 218 (6th Cir. 1979) ("Having voluntarily

chosen to enter a conspiracy of national scope, appellant's limited their right to be tried according to the standards of the localities in which their operations are centered.")

CONCLUSION

For the foregoing reasons this Court should hold that the provisions of 47 U.S.C. § 223(b) pass constitutional muster.

Respectfully submitted,



Benjamin W. Bull
2845 E. Camelback Rd.
Suite 740
Phoenix, Arizona 85016
(602) 381-1322

Counsel for
Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amici Curiae Citizens for Decency through Law, Inc., the Christian Life Commission of the Southern Baptist Convention, and Rebecca C., infant, by and through her parents Paulette Callen and Gary Callen, have been sent by U.S. Mail, Postage Prepaid, on this 22 day of February, 1989, to:

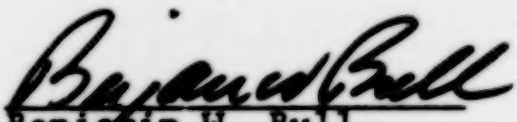
Richard K. Simon, Esq.
Counsel of Record
2029 Century Park East
Suite 3800
Los Angeles, CA 90067

Counsel for Appellees
and Cross-Appellants

William C. Bryson
Solicitor General
Department of Justice
Washington, D.C. 20530

Counsel for Appellants
and Cross-Appellees

All parties required to be served have been served.



Benjamin W. Bull
Counsel for
Amici Curiae

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Nos. 88-515 and 88-525

In The

Supreme Court of the United States

October Term, 1988

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Appellants and Cross-Appellees,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,

Appellee and Cross-Appellant.

On Appeal From The United States District Court For The Central District Of California

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF INTERACTIVE INFORMATION PROVIDERS

William Bennett Turner
Counsel of Record
Donna Brorby
Nina Rivkind
Turner & Brorby
750 Battery Street, 7th Floor
San Francisco, CA 94111
Telephone: (415) 391-8100

Earl Nicholas Selby
420 Florence Street
Palo Alto, CA 94301
Telephone: (415) 323-0990

Attorneys for Association of Interactive Information Providers as Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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With the consent of the parties, the Association of Interactive Information Providers submits this brief as *Amicus Curiae*. Pursuant to Rule 36.2, copies of the letters of the parties consenting to the filing of this brief have been lodged with the Clerk.

INTEREST OF AMICUS

The Association of Interactive Information Providers is composed of telecommunications companies whose business includes providing *live*, as opposed to recorded, telephone information and entertainment services. The services are provided throughout the United States and in several foreign countries.

The new technology used by *Amicus* companies permits, for the first time ever, a different kind of human interaction – anonymous conversation on topics of personal interest to the caller – that has great public appeal. There is no "alternative means" of engaging in this kind of communication. The telephone, in the privacy of one's home, uniquely offers this opportunity.

Association members provide a wide range of information and entertainment services over telephone lines, typically sharing revenue with the local Bell Operating Companies, which bill and collect the charges for the calls. In some cases, calls are charged by credit card. Association members' live services are of two basic kinds: "chat" or "GAB" lines, and "one-on-one" conversations.[1]

[1] In some cases, the services consist of recorded messages with an option for the caller to "cut through" to a live conversation. Other services involve messages left by the caller. Some

(Continued on following page)

Chat or GAB (for "group access bridging") lines connect two or more (up to eight) callers in much the same manner as old-fashioned party lines and newer conference calls do, though using advanced "group bridging" technology. Association members ("Information Providers") provide information and entertainment services using interactive group bridging equipment; one member is a manufacturer of the equipment and supplier of related software. Chat line callers share various common interests. For example, Association members offer chat lines for sports fans, senior citizens, teenagers, callers interested in religious fellowship and other interest groups, as well as lines for adult sexually oriented conversation. Chat lines often are used by people who are lonely or unable to move freely outside the home, and are dependent on the telephone for communicating with other persons. For example, chat lines are usable and used by AIDS victims and other disabled persons. Typically, calls are monitored by a moderator employed by the Information Provider, who enforces guidelines for the particular chat line, disconnects disruptive callers, transfers callers from group to group, and may help initiate the conversation.

Live one-on-one services are basically of two types. One connects the caller to an Information Provider's employee, and the two carry on a personal conversation

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Association companies also offer videotext services. Callers to these services record their own written messages, by personal computer or similar device. Videotext services can offer live interaction but do not provide live conversation. Nor do they involve messages recorded by the company. Callers "converse" using their own messages.

on the topic the caller desires. The other connects two callers to each other, with no company employee remaining on the line.

The conversation on live lines is spontaneous, and some callers wish to converse in sexually explicit terms. Callers to live services do not want "canned" taped messages, but seek responses to their own thoughts and feelings; they want a conversation with someone who is listening and able to respond with nuance, understanding or humor. Callers to "adult" one-on-one and chat lines find value in being able to speak anonymously on intimate and sexual subjects.

The public demand for these live telephone services is great. Contrary to the intimation in the government's brief that "two-way communications" may not constitute a "substantial portion of Section 223(b)'s applications" (Gov. brief at 23, n. 15), in 1987 there were approximately 37,000,000 live 976 calls carried by Pacific Bell in California alone, significantly more than the approximately 29,000,000 calls to recorded "adult" programs.[2] This huge

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[2] *See* Application 88-04-004 (filed April 1, 1988, before the California Public Utilities Commission), "In the Matter of Application of Pacific Bell, a corporation, for Authority to Establish a Tariff Schedule for Information Calling Services," Hearing Exhibits 7 and 10 (data supplied by Pacific Bell and received into evidence). Pacific Bell reported that it billed $37.914 million in revenue from what it characterized as "talk" plus "adult live" calls in 1987, as compared to $29.953 million in recorded "adult" calls. Assuming that the revenue is derived from $2 calls, the number of billed calls would be one-half of the revenue dollars. But *Amicus* companies estimate that the total number of calls to 976 numbers in California is roughly double the number of *billed* calls; *Amicus* companies

(Continued on following page)

demand for live telephone services reflects a human need that cannot be met in other ways.[3] Individuals in great numbers are making choices to use their telephone, in their own home, to discuss matters of interest to them with other individuals willing to converse anonymously.

Contrary to the Government's assertion that live telephone conversations are "not at issue" in this case (Gov. brief at 6, n. 3), the statute expressly reaches live as well as recorded telephone speech, forbidding communications made not only by "recording device" but *"directly."* *Amicus* therefore has a vital interest in the issues before the Court, an interest different from that of Sable Communications. Sable's case involves *recorded* telephone messages, in which the caller listens to sexually explicit tapes. But the statute, 47 U.S.C. sec. 223(b), encompasses *live* telephone conversations as well. Further, it subjects

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are paid for only about one-half of the 976 calls they receive: intrastate calls. Like other Bell Operating Companies, Pacific Bell does not bill for calls made to 976 numbers from out-of-state. While the actual number of calls cannot be precisely quantified, two things are clear: (1) the volume of *live* calls is huge, and (2) the volume of such calls *exceeds* the volume of recorded adult calls. One Association member conservatively estimates that in 1987 it handled at least 30,000,000 live calls nationwide.

[3] Lest the government respond that this need is somehow illegitimate, the sheer number of calls to live information services strongly indicates the contrary. Live telephone services appear to answer a basic human need to discuss, among other things, sexual subjects in the anonymous privacy of the caller's home. Of course, the statute here criminalizes pure speech, not illegitimate conduct like the sale of illegal drugs.

to criminal liability both making an obscene or indecent statement and *permitting*, "for commercial purposes," any such statement to be made on the telephone.

"Adult" entertainment services offered by Association members often do involve the use of sexually explicit language.[4] Because they involve pure speech among adults who have chosen to participate in these human interactions, these sexually oriented conversations are, *Amicus* believes, socially useful and responsive to real needs, and suppressing this speech does not fall within any legitimate government interest. Association members also offer services that involve sexually explicit conversation for purposes that are not primarily entertainment. For example, on chat lines for persons interested in prevention of sexually transmitted diseases like AIDS, sex inevitably is a subject of the conversation. *Amicus* believes that such conversations are socially and psychologically useful, and even therapeutic for many callers.

Amicus also wishes to call to the Court's attention facts regarding the technological and economic feasibility

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[4] The Government's persistent use of the slogan "dial-a-porn" does not advance analysis. The slogan certainly is not descriptive of the services offered by *Amicus* companies. Nor does it have meaning in law: What is simply pornographic is not legally "obscene" under *Miller* v. *California*, 413 U.S. 15, 18, n. 2 (1973). The government seems to use "dial-a-porn" as a shorthand argument that any mention of sex on a 976 line is "pornographic" and therefore obscene. The government's talismanic use of "dial-a-porn" is no substitute for the necessary constitutional analysis.

of various techniques for preventing children from being exposed to sexually explicit telephone communications.

SUMMARY OF ARGUMENT

The Court has never held that government may make criminal the sexual content of an individual's live conversation with another individual. The statute involved here, 47 U.S.C. sec. 223(b), is unconstitutional insofar as it criminalizes statements made in a live telephone conversation between persons who wish to speak to each other. The statute broadly proscribes speech. Moreover, it proscribes speech in which there are significant privacy and associational interests: telephone conversations between individuals.

The statute makes criminal the utterance of both "obscene" and "indecent" statements, but it defines neither. The offending sexual conduct is not "specifically defined" by the statute, as required by *Miller* v. *California*, 413 U.S. 15 (1973). The test of "indecent" speech used in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), can be applied only in the context of broadcast regulation, not in a criminal statute governing live telephone conversations. The test of "obscene" speech established by *Miller* would be nonsensical if applied to live telephone conversations: a conversation is not a relatively fixed "work" in the sense used in *Miller*; while a conversation may not have "literary, artistic, political, or scientific value," it may have significant social, psychological and therapeutic value for the participants; and interstate conversations cannot validly be judged by "community standards" of a

community remote from the Information Provider's business, with the prosecution hinging on the fortuity – against which the company cannot guard – that a call (for which the company is not paid) is initiated by an out-of-state caller.

As a criminal statute applying to live telephone conversations between individuals, Section 223(b) fails to give fair notice of prohibited conduct and deters protected speech. The previous civil and regulatory sanctions were amended out of the statute, so it must satisfy the rigorous requirements governing criminal punishment of speech-related offenses. The lines between "indecent" speech and "decent" speech and between a protected human conversation and an "obscene" one are too elusive for a criminal statute.

The statute, as applied to live human conversation, is impermissibly vague and overbroad. It exceeds any legitimate government interest in preventing children and unwilling adults from being exposed to sexually explicit language. In the case of live, interactive telephone services, individual callers initiate the communications and converse on the subjects of their choice; unwanted calls do not intrude unannounced into the home.

The statute has a substantial number of impermissible applications. It suppresses a wide variety of sexually explicit speech between adults. It criminalizes personal conversations legitimately dealing with sexual matters. The government has no valid interest in outlawing or deterring conversations on topics like AIDS prevention and "safe sex."

Finally, any valid governmental interest can be served by a much more narrowly tailored statute. Various techniques can effectively prevent minors and unwilling adults from being exposed to sexually explicit telephone conversations. These include monitoring to disconnect callers who are too young and requiring credit card screening or access codes, as well as new technological solutions using central office "blocking," scrambling and "beep tones." The statute, however, imposes strict criminal liability regardless of an Information Provider's good faith implementation of these techniques.

ARGUMENT

47 U.S.C. SECTION 223(b), INSOFAR AS IT IMPOSES CRIMINAL LIABILITY FOR MAKING EITHER "INDECENT" OR "OBSCENE" STATEMENTS IN A LIVE TELEPHONE CONVERSATION BETWEEN INDIVIDUALS, VIOLATES THE FIRST AMENDMENT

Introduction – The Statute

As amended in 1988, 47 U.S.C. sec. 223(b) does the following:

1. eliminates Section 223(b)'s previous references to children and unwilling adults, thus criminalizing "indecent" or "obscene" telephone communication regardless of to whom the communication is made;

2. prohibits making an "indecent" or an "obscene" statement on the telephone not only by "recording device" but "directly" in live telephone conversation between individuals;

3. provides no definition of either "indecent" or "obscene" communication;

4. imposes solely criminal liability, unlike the regulatory measure involved in *FCC* v. *Pacifica Foundation*;

5. imposes criminal liability not merely on the person making the indecent or obscene communication but on anyone who *"permits"* such a communication by a caller;

6. in the case of Information Providers like *Amicus* companies, imposes liability not on someone who intrudes into the home with an unwanted call, but on the recipient of the call; and

7. imposes strict criminal liability regardless of good faith and diligent efforts by the Information Provider to screen out minors attempting to use the service.

In short, the statute is not a "sensitive tool" for regulating unprotected speech. *See Speiser* v. *Randall*, 357 U.S. 513, 525 (1958). It is a crude and defective piece of legislation whose attempt to impose criminal liability for making or permitting an "indecent" or "obscene" statement in a live telephone conversation between individuals violates the First Amendment The statute, at least insofar as it criminalizes live human conversation, is impermissibly vague and overbroad.

A. The statute is impermissibly vague since it provides no definition of "indecent" or "obscene."

Section 223(b) proscribes both "indecent" and "obscene" communications, but it defines neither. This violates one of the fundamental tenets of sexual speech regulation: that the prohibited matter "must be specifically defined by the applicable [law] as written or authoritatively construed." *Miller* v. *California*, 413 U.S. 15, 23-24 (1973); *see New York* v. *Ferber*, 458 U.S. 747, 764 (1982).

The government acknowledges that Congress failed to define either type of felonious communication, but asserts that the legislative history shows that Congress must have meant to define "indecent" as the Court did in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), and must have meant to define "obscene" as the Court did in *Miller* v. *California*, *supra*. Gov. Brief at 18. This is a very peculiar way to legislate. As Justice Scalia recently remarked, "Congress is elected to enact statutes rather than point to cases," and "unrestrained use of legislative history" is no substitute for valid legislation. *Blanchard* v. *Bergeron*, ___ U.S. ___ , No. 87-1485 (Feb. 21, 1989).

Even if the Court were inclined to "construe" Section 223(b) to include the definitions of the key terms as used in *Pacifica* and *Miller*, the definitions do not fit the context. Neither definition can be carried over from the context in which it was written to the prohibition of live telephone conversations.

1. *Pacifica's* Definition of "Indecent"

In *Pacifica*, the Court's plurality opinion upheld the FCC's definition of "indecent" for the purpose of broadcast regulation: "language that describes, in terms patently offensive as measured by contemporary community standards *for the broadcast medium*, sexual or excretory activities and organs, *at times of the day when there is a reasonable risk that children may be in the audience*." 438 U.S. at 732 (emphasis added).[5]

This definition cannot be transplanted to the context of live telephone conversation. *First*, "the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983) (invalidating statute prohibiting unsolicited mail advertising of contraceptives) (footnote omitted).[6] There is no

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[5] Ripping the *Pacifica* definition from its context, the government's brief here simply omits "broadcast" and the italicized time-of-day provision from its quotation of the *Pacifica* definition. Gov. Brief at 18. However, the government does acknowledge that *Pacifica* "would require an *extension* to reach this case." *Id.* at 22, n. 14 (emphasis added).

[6] The unsolicited advertisements in *Bolger* – "Plain Talk about Venereal Disease" and "Condoms and Human Sexuality" (463 U.S. at 62, n. 4) – might have been considered "indecent" by some recipients, especially those with religious scruples about contraceptives. The Court rejected the government's argument that the statute was needed to keep unsolicited sexual material out of the hands of children. *Id.* at 73-74.

more justification for criminalizing "indecent" live conversation than there is for banning "indecent" printed words.[7] As the only courts to have considered the issue have correctly held, "the *Pacifica* decision does not justify the regulation of indecent telephone messages." *Carlin Communications* v. *FCC*, 837 F.2d 546, 560 (2d Cir. 1988); *Roe* v. *Meese*, 689 F.Supp. 344, 346-47 (S.D.N.Y. 1988); *Sable Communications* v. *FCC*, 692 F.Supp. 1208, 1209 (C.D.Cal. 1988).

Second, the *Pacifica* definition was expressly linked to both the broadcast medium and to a regulatory determination that offensive language should not be used at a time of day when children might be listening. There was no thought that even "indecent" speech could be *totally* barred from the airwaves. Rather, the Court found no right of an "intruder" – the radio broadcast – to thrust itself into the home at a time when children would be in the audience. 438 U.S. at 748-49.

Subsequent cases appropriately have read *Pacifica* as confined to its facts. For example, the courts have invalidated statutes attempting to extend bans on "indecency" to cable television, reasoning that parents can choose

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[7] Indeed, there is less justification, as virtually all publications – including major national newspapers – are now printed using electronic means, many over telephone wires. *See In re Syracuse Peace Council*, 2 FCC Rcd 5043, 5053-54 & n. 188 (Aug. 6, 1987). The government has not suggested that it has any legitimate interest in banning "indecent" words in print, regardless of their availability to children. In *Syracuse Peace Council*, involving the "fairness doctrine," the FCC concluded that "the role of the electronic press in our society is the same as that of the printed press," and that content-based regulation is acceptable in neither. *Id.* at 5057.

whether to subscribe to a cable service and can exercise control to prevent their children from watching programs with sexual content. *See Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah* v. *City of Roy*, 555 F. Supp. 1164 (D. Utah 1982). In *Wilkinson* v. *Jones*, 107 S.Ct. 1559 (1987), the Court summarily affirmed the Tenth Circuit's decision to the same effect, *Jones* v. *Wilkinson*, 800 F.2d 989 (10th Cir. 1986). The present statute strays even farther afield from *Pacifica*: not only is there no broadcasting "intrusion" into the home, but Section 223(b) broadly prohibits mature adults from conversing on a wide variety of sexual topics.

Finally, *Pacifica* merely imposed a regulatory sanction on a government licensee. It did not involve a criminal statute of general application to all citizens, proscribing "indecent" language in conversation with other people and imposing severe penal sanctions. *Pacifica* did not empower the federal government to police blunt language in private telephone conversations between individuals. The line between "indecent" conversation and "decent" conversation is far too elusive for use in a criminal statute. *Cf. City of Houston* v. *Hill*, 107 S.Ct. 2502, 2510, n. 11 (1987); *Board of Airport Commissioners* v. *Jews for Jesus*, 107 S.Ct. 2568, 2573 (1987) (line too "murky"); *Kolender* v. *Lawson*, 461 U.S. 352, 359, n. 8 (1983); *Stanley* v. *Georgia*, 394 U.S. 557, 566 (1969) ("The line between transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.").

2. *Miller's* Definition of "Obscene"

It would be nonsensical to apply the *Miller* definition to a live telephone conversation of the kind offered by *Amicus* companies. It simply does not fit the context. *Miller* was decided a decade before the technology used by the *Amicus* companies even existed, and was addressed to a very different kind of communication.

First, a conversation between two people on the telephone is not a "work" in the sense used by *Miller*. The legal definition of obscenity was intended to deal with relatively fixed presentations – films, photographs, magazines, books or even performances – not with spontaneous, unrehearsed talk. Thus, it makes no sense to speak, in the context of live chat line or one-on-one services, of "the work, taken as a whole . . . ."

Second, as applied to telephone conversations like those offered on chat lines and one-on-one services, the *Miller* test fails to recognize constitutionally protected values. For example, a chat line conversation among AIDS victims may not be a "work" having "serious *literary, artistic, political or scientific value.*" 413 U.S. at 24 (emphasis added). But it might have very significant social, psychological and therapeutic value to the conversants, and there is no basis for according less weight to such value than to matters of taste like literary and artistic value. *Cf. Pope* v. *Illinois*, 107 S.Ct. 1918, 1923 (1987) (Scalia, J., concurring: *"De gustibus non est disputandum"*).

Finally, as Sable Communications has urged in this case, *Miller* requires reference to local community standards, and does not permit the government to prosecute

someone for making statements that are offensive in only the most conservative and sexually orthodox communities. Yet here the government's argument would allow prosecution under Utah or Mississippi community standards of a local 976 San Francisco "chat line" service called by someone in those states. The Information Provider would be judged under the standards of the remote and rural Utah or Mississippi community even though it is not physically present and does not advertise in the community, and even though it derives no revenue from out-of-state 976 calls. Imposing criminal liability would be a perversion of the *Miller* reasoning, which recognized and allowed for the diversity of sexual opinions and mores in our Nation. As Justice Harlan feared, it would present "the very real danger of a deadening uniformity which can result from nation-wide federal censorship." *Roth* v. *United States*, 354 U.S. 476, 506 (1957).[8]

B. As a criminal statute applying to telephone conversations, section 223(b) fails to give fair notice of prohibited conduct.

Section 223(b), with or without the *Pacifica* and *Miller* definitions, violates familiar and long established principles of criminal legislation, particularly laws restricting speech:

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[8] In arguing for a "national" standard in the face of *Miller's* contrary requirement, the government repeatedly characterizes the telephone as an "inherently national medium." But the telephone is *less* nationally pervasive than television and radio and no more "national" than movies and books, all of which are generally aimed at a national market. The government offers no persuasive reason why local community standards should govern all media except the telephone.

> "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . .Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'"

Grayned v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) (citations omitted); *see Kolender* v. *Lawson*, *supra*, 461 U.S. at 357, 359, n. 8. Section 223(b), as applied to live telephone conversations, fails to give "fair notice" of what is prohibited, and therefore violates due process of law. *Ibid.*[9]

This vagueness creates very serious problems for a company that, for example, offers a "chat line" for persons who share a common interest in discussing "safe sex" or, indeed, any adult conversation involving sex. Short of going out of business, the company cannot safely "steer clear" of unlawful conduct under Section 223(b). It cannot avoid prosecution by requiring its monitor to instruct participants not to say anything "indecent" or "obscene." Even if the monitor reads from the Court's *Pacifica* and *Miller* decisions, it is wholly unrealistic to expect the average person – as opposed to, say, the calculating and well-counseled radio or television station, or a

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[9] *Accord*, *Winters* v. *New York*, 333 U.S. 507, 515 (1948); *cf. Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1971) (vagrancy ordinance). The Court's decisions invalidating statutes of which persons of ordinary intelligence must guess at the meaning consistently emphasize the inappropriate use of the criminal sanction in speech regulation, for fear that protected speech will be deterred.

businessman who may wish to traffic in sexually graphic films[10] – to appreciate the nuances of complicated legal proscriptions and act on them. If the monitor actually uses the "Filthy Words" from the George Carlin monologue to illustrate what might be considered "indecent," the company might be prosecuted for that alone. And it is hopeless to pretend that either the company conversationalist or the callers will be able to make the crucial distinctions between talk that is "obscene" (carrying very heavy criminal penalties), talk that is merely "indecent" (carrying less severe penalties) and talk that may be sexually explicit or coarse but is permissible.

Since the company is subject to felony prosecution even if it only "permits" an indecent or obscene statement to be made (including in one-on-one services where no company employee remains on the line), the only way to "steer clear" of the prohibited zone is to go out of business. This may be precisely what the statute's proponents intended. Yet this would deprive a great many Americans of the opportunity to use the telephone in the privacy of their homes to discuss, anonymously but with other persons sharing similar interests, *anything* in "indecent" language, including politics, religion or intimate sexual topics.

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[10] The radio or television station, and the purveyor of films, can seek legal advice in advance of broadcasting or marketing their products. But no attorney advising a "chat line" service could possibly – without unacceptable malpractice exposure – give an opinion that future live conversations will not be found "indecent" or "obscene." At the very least, any advice would have to be so conservative as to result in deterring large amounts of protected speech.

Nor is it irrelevant that government enforcement of this criminal statute inevitably will involve either wiretapping or participation by government agents in live telephone conversations. Unlike the situation with recorded messages, enforcement of Section 223(b)'s prohibitions on "directly" making indecent or obscene statements brings Big Brother into countless homes to listen in on individuals discussing highly personal matters – matters into which the government has no business intruding.

By authorizing a prosecution whenever an Information Provider "permits" indecent or obscene communications, the statute also all but invites sabotage operations by competitors or vigilante groups intent on putting the company out of business, by subjecting it to a prosecution too costly to defend. For example, a saboteur could deliberately call an Information Provider's chat line and make indecent or obscene communications. The Information Provider would be subject to prosection even if it had, after the fact, disconnected the caller as quickly as possible.

C. The statute's prohibitions exceed any legitimate government interest.

The Court has never held that government may make criminal the sexual content of an individual's conversation with another individual. Section 223(b), however, imposes criminal liability not only for playing taped messages to callers but also for making communications

"directly" in live telephone conversation between individuals.[11]

The only interest that the government asserts in support of the amended Section 223(b) is protecting *children* from offensive sexual language accessible by telephone. Gov. brief at 19. But the statute sweeps far beyond this interest, criminalizing a wide variety of adult speech in which the government has no legitimate interest.

Indeed, the 1988 amendments to the statute eliminated all reference to minors or unconsenting adults, thus making it criminal to utter an "indecent" statement to a consenting adult. This is not a case of a sound truck or a broadcast that cannot be silenced without hearing the offending message. Nor is this a case in which unwanted telephone calls intrude unannounced into the home. The statute here imposes liability for communications made in calls initiated by consenting adults. Indeed, it imposes liability on the Information Provider when it "permits" an offending statement to be made by *the caller* in a conversation with another person.[12] And it imposes liability regardless of diligent efforts by the company to

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[11] No one contends here that government may not criminalize obscene telephone calls made to an unwilling recipient. *See, e.g.*, 47 U.S.C. sec. 223(a); Calif. Penal Code sec. 653m. Liability for this kind of telephonic assault, intruding unannounced into the unconsenting victim's home, is very different from the liability imposed by Section 223(b).

[12] This is true even for the type of "one-on-one" service in which the Information Provider merely connects two callers and no company employee remains on the line.

screen out minors, to warn callers about sexually explicit language or to disconnect disruptive callers.

Thus the statute reaches far beyond any legitimate interest in protecting children and unwilling adults from hearing sexually explicit language.[13] The government attempts to justify its overreaching by asserting that the only way to protect all children from hearing adults talk about sexual matters is to censor the adults' telephone conversations. Gov. brief at 13, 32-36. First, the argument is unfair. There is no way to protect *all* children from anything. (Indeed, children have been known to penetrate sophisticated computer defenses to gain access to national security information.) Just as the government's response to the known (and arguably greater) evils of alcohol and cigarettes is regulation and not prohibition, so in the area of pure speech the appropriate response to the potential harm of explicit sexual talk is reasonable regulation and not banning all such talk.

Second, the argument is factually incorrect. There are new and effective technological means to permit parents to contain their children's curiosity. *See* point E, *infra*. In addition, monitors employed by Information Providers can screen out children. *Ibid*.

Because, with reasonable safeguards, the live, interactive telephone services offered by *Amicus* companies are not readily accessible to children, suppressing the speech used in their services does not fall within any

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[13] It should also be remembered that any federal (as opposed to state) interest in policing obscenity in general is "attenuated" because "Congress has no substantive power over sexual morality." *Roth* v. *United States*, *supra*, 354 U.S. at 504 (Harlan, J.).

legitimate government interest.[14] The government identifies *no* interest in denying to willing adults the right to converse person-to-person on any subject they wish.[15]

D. The statute has a substantial number of impermissible applications.

Section 223(b) broadly proscribes certain forms of speech, not conduct. Moreover, it proscribes speech in

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[14] Congress of course has power to regulate the telecommunications industry. But in 1988 Congress eliminated Section 223(b)'s previous regulatory and civil sanctions, so the statute before the Court must stand or fall not as a reasonable regulatory measure but a criminal law prohibiting certain forms of speech.

[15] To the extent that the federal government has a valid interest in suppressing indecent and obscene telephone communications, Section 223(b) is so underinclusive as to be arbitrary and capricious. Section 223(b) reaches only "interstate" calls, while the overwhelming number of sexually oriented calls for commercial purposes are *local* calls, usually offered on the 976 exchange prefix. For example, in only nine states can a 976 number be accessed by an interstate call; in the other states either there is no 976 service or the numbers are completely blocked from interstate calls. Those companies offering 976 adult oriented telephone information services would promptly be out of business if they had to rely on interstate calls, because they are paid by the local Bell Operating Company only for calls made in a "local access and transport area" (LATA), except in California where Information Providers are paid on intrastate interLATA calls but not interstate calls.

Whether an Information Provider is subject to prosecution in the states where it can receive interstate calls depends on the fortuity – against which the company cannot guard – of whether someone calls its service from another state.

which there are significant privacy and associational interests: telephone conversations between individuals. Citizens of course have a privacy interest in having sexual material, even obscene material, in their own homes. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). *Stanley* "was firmly grounded in the First Amendment." *Bowers* v. *Hardwick*, 478 U.S. 186, 195 (1986). Further, the Court has long recognized that people have a "reasonable expectation of privacy" in speaking over the telephone. *Katz* v. *United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

Insofar as the statute criminalizes statements made in live human conversation over the telephone, it is overbroad, with a substantial number of impermissible applications. *See Board of Airport Commissioners* v. *Jews for Jesus*, *supra*, 107 S.Ct. at 2571-72; *City of Houston* v. *Hill*, *supra*, 107 S.Ct. at 2508; *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). For example, speech on "chat lines" and live "one-on-one" conversations offered by *Amicus* companies is protected, whether it is considered entertainment or simply explicit sexual talk. Nor does the government have any legitimate interest in suppressing frank conversations about, for example, prevention of AIDS, "safe sex" and the proper use of condoms, in which sex is *the* subject. This is "material legitimately treating with sex," not unprotected speech. *Cf. Pinkus* v. *United States*, 436 U.S. 293, 300 (1978), quoting *Roth* v. *United States*, *supra*, 354 U.S. at 489. An unwilling listener – or a juror in a criminal prosecution – might deem blunt sexual language "indecent" or even "obscene."[16] But adequate screening of chat

[16] Indeed, the United States Senator who was the principal proponent of the amendments to Section 223(b) declared that

(Continued on following page)

lines excludes unwilling listeners and minors. Users of the chat lines find real psychological or therapeutic value in being able to discuss intimate matters anonymously, with other individuals who share the same perspective or interests.

Contrary to the government's suggestion that there are "alternative" means for adults to enjoy recorded messages (Gov. brief at 34), there is no comparable substitute for individuals who wish to participate anonymously in conversations with other individuals about intimate subjects. The telephone, in the privacy of one's home, uniquely offers this opportunity.[17]

E. A more narrowly tailored statute would satisfy any legitimate government interest with regard to live telephone conversations.

As noted above, the only interest asserted by the government is preventing children from being exposed to

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(Continued from previous page)

written "safe sex" educational materials were "obscene." 133 Cong. Rec. S14203 (daily ed. Oct. 14, 1987) (statement of Sen. Helms). It is true that Senator Helms' statement was made in the context of supporting legislation to ban federal funding of such materials rather than to criminalize them. But if a prominent legislator believes that such materials are appropriately called "obscene," it is not farfetched to suggest that prosecutors and jurors will have similar reactions.

[17] The absurdly broad reach of the statute is illustrated by the fact that it would make criminal a psychiatric patient's bluntly sexual telephone conversation with his therapist, and an Information Provider's telephone conversation with its lawyer about the kinds of communications used in the services offered by the company (since both therapist and lawyer are engaging in the communication "for commercial purposes"). Though these examples seem farfetched, they fall within the literal terms of the statute. —

indecent or obscene telephone messages. The government points to the ubiquity of telephones and the assumed ease of dialing as support for its claim that only a complete ban on such messages can serve this interest. In fact, however, this interest can be served by a statute that is much more narrowly tailored.

There are a variety of means that currently are used and can be used to make it virtually impossible, without the complete cooperation and encouragement of their parents, for children to hear live, interactive, sexually explicit telephone conversations. One or more of these means would satisfy the governmental purpose without outlawing a wide range of speech by mature adults. Their use should provide a defense to criminal prosecution.

1. Monitoring

Unlike recorded message services, live telephone services typically employ monitors. Before a caller is allowed to participate in either a chat line or one-on-one conversation, he or she can be required to speak first to the monitor. The monitor may warn the caller of the sexual nature of the particular service. The monitor may also be instructed to disconnect any caller who sounds too young (for example, a caller whose voice sounds childlike or adolescent and who cannot instantly recite his year of birth showing his majority). *Cf. Butler* v. *Michigan*, 352 U.S. 380, 383 (1957) (less restrictive means available at point of sale, by requiring booksellers to sell only to adults).

2. Credit Card Screening

In compliance with earlier FCC regulations (*see Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546, 549 (2d Cir. 1988)(*"Carlin III"*), several live information and entertainment services require payment by credit card before the caller is allowed to participate. The obstacles that this presents for children are formidable. The caller must get through elaborate screening by a company employee. Typically, the caller must not only give the credit card number and expiration date but also the issuing bank name or number; this information does not come through on credit card receipts but is on the actual card. The caller is asked the number of the telephone called from and under whose name it is listed. Then the caller is asked for his Social Security number and driver's license number. If the caller does not have the information, he is disconnected. If he gets this far, he is asked his date of birth, which of course has to demonstrate that he has reached majority. (If a minor has acquired his father's card and is impersonating his father, he must think quickly of his father's date and year of birth.)

During this questioning, the company reaches the card-issuing bank by computer and verifies information about the card holder. The company also simultaneously calls the telephone number given by the caller, to verify that it is busy (and that the caller is not using someone else's phone or a pay phone). Alternatively, the company may call directory assistance to verify the name and number. Even if the minor somehow survives this screening, if his voice and manner seem too young to the monitor, he is not allowed to participate.

Screening like this, while mostly aimed at preventing credit card fraud, makes it practically impossible for a child, without parental collusion, to participate in a live telephone service of the kind offered by *Amicus* companies. *Amicus* companies have experienced a substantial reduction in call volumes when they use credit card screening. Many potential callers refuse to sacrifice their anonymity to anyone but the local telephone company for its billing purposes. In addition, the transaction costs associated with this type of screening are substantial and require much higher charges to callers, which also explains the drastic call volume reduction. However, even with these drawbacks, credit card screening is a significantly less restrictive approach to excluding minors than a complete ban like Section 223(b).

3. Access Codes

Also in compliance with earlier FCC regulations (*see Carlin III, supra*), some providers require an access code or personal identification number before being able to participate. This again entails elaborate screening much like that used for credit cards, with all the drawbacks of credit card screening and, in addition, a written application by the prospective caller. Once again, *Amicus* companies that have experimented with access codes have experienced major reductions in call volumes, which they attribute principally to the loss of caller anonymity.

4. Blocking

"Blocking" certain lines is of two kinds: "central office blocking" and "customer premises blocking." The

information on which the FCC based its rejection of both as a reasonable solution for families who wish to eliminate the possibility of their children dialing "adult" telephone services (*see Carlin III*) is out of date as to central office blocking. *See, e.g., Fabulous Associates, Inc.* v. *Pennsylvania Public Utility Commission*, 693 F.Supp. 332, 339 (E.D. Pa. 1988) (PUC tariff effective August 1, 1988, provides for central office blocking). In the past two years, *Amicus* has ascertained, local Bell Operating Companies around the country have established, with the approval of the state public utility commissions, tariffs providing for central office blocking. Many local carriers now offer their customers central office blocking at no or minimal cost.

Blocking affords families the option of preventing their telephones from being used by their children to reach undesired services.[18] It gives parents substantial control. If parents fail or refuse to exercise appropriate supervision of their children, it is not the government's role to step in with criminal legislation that outlaws or deters a substantial amount of speech among mature adults. *See Fabulous Associates, Inc.* v. *Pennsylvania Public Utility Commission, supra*, 693 F.Supp. at 339, n. 14.

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[18] Pay phones are easily programmed, and almost all already are programmed, to block calls to Information Providers on 976 and 900/700 numbers, so children would not be able to circumvent parental control by using them.

5. Scrambling

As noted in *Carlin III*, scrambling technology is available. Telephone services can scramble calls made to their lines, and only callers who purchase a descrambling device are able to use the service. This gives parents another option to prevent their children from using their telephones to participate in "adult" telephone conversations.

6. Beep Tone Technology

As also noted in *Carlin III*, telephone services could use electronic beeps at the outset of each call. These beeps would disconnect any telephone equipped with a beep tone device. *Amicus* understands that in the past year there have been additional developments indicating the promise of such a device for giving parents still another option for preventing their children from making undesired calls.

In short, there are readily available techniques for serving the government's purpose, especially with regard to live, interactive telephone conversations. Section 223(b), as written, is crudely defective legislation that cannot constitutionally be applied to the kinds of telephone services offered by the *Amicus* companies.

CONCLUSION

For the reasons stated, the order of the district court should be affirmed insofar as it enjoins enforcement of the statute prohibiting "indecent" speech and reversed insofar as it declines to enjoin enforcement of the statute prohibiting "obscene" speech. Even if the Court were to affirm the order as to obscene recorded messages, the Court should make clear that the statute may not be invoked to prohibit either indecent or obscene speech in live telephone conversations between individuals.

Dated: March 20, 1989

Respectfully submitted,

WILLIAM BENNETT TURNER
Counsel of Record
DONNA BRORBY
NINA RIVKIND
TURNER & BRORBY
750 Battery Street, 7th Floor
San Francisco, CA 94111

EARL NICHOLAS SELBY
420 Florence Street
Palo Alto, CA 94301

Attorneys for Association of Interactive Information Providers as Amicus Curiae

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In The

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Federal Communications Commission and Richard L. Thornburgh, Attorney General of the United States,

Appellants and Cross-Appellees,

v.

Sable Communications of California, Inc.,

Respondent and Cross-Appellant.

On Appeal From The United States District Court For The Central District Of California

BRIEF OF THE SAN FRANCISCO AIDS FOUNDATION AS *AMICUS CURIAE* IN *SUPPORT OF CROSS-APPELLANT*

LEONARD GRAFF*
BENJAMIN SCHATZ
National Gay Rights Advocates
540 Castro Street
San Francisco, CA 94114
(415) 863-3624

Attorneys for the San Francisco AIDS Foundation, Amicus Curiae

March 24, 1989

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Respondent and Cross-Appellant.

BRIEF OF THE SAN FRANCISCO AIDS FOUNDATION AS *AMICUS CURIAE*

This brief *amicus curiae* is submitted with the written consent of all parties pursuant to Rule 36.2. The brief is intended to draw the Court's attention to the particular perspective of the San Francisco AIDS Foundation as it may bear upon the issues in this case. Owing to the requirements of Rule 36.2, the brief is captioned in support of cross-appellant.

INTEREST OF THE AMICUS

The San Francisco AIDS Foundation ("the Foundation") is a not-for-profit corporation founded in 1982. The Foundation furnishes social services, emergency housing and a food bank to people with Acquired Immune Deficiency Syndrome ("AIDS") and HIV (AIDS virus) infection. The Foundation also provides AIDS-related information to the public regarding prevention, transmission, epidemiology, and treatment of the disease.

The Foundation's work is supported through the philanthropy of individuals and of diverse civic, business, and charitable organizations. The work of the Foundation has been recognized by the Surgeon General of the United States, whose "Report on Acquired Immune Deficiency Syndrome" p. 36 (hereinafter "Surgeon General's Report") directs the public to the Foundation as a source of information concerning AIDS and HIV.

The disease "AIDS" and its characteristics were described in *Chalk v. United States District Court*, 840 F.2d 701, 706 (9 Cir. 1988).

> AIDS is caused by infection of the individual with HIV, a retrovirus that penetrates chromosomes of certain human cells that combat infection throughout the body. . . .Eventually, the virus destroys its host cells, thereby weakening the victim's immune system. When the immune system is in a compromised state, the victim becomes susceptible to a variety of so-called "opportunistic infections," many of which can prove fatal.

SUMMARY OF ARGUMENT

This Court is called upon to fashion rules which will determine the enforceability of an outright ban on sexually oriented telephone communications, even as they may be directed at or received by mature and receptive adults. Because sexually explicit telephone communications may play a positive role in curbing the AIDS epidemic, the nation's obscenity laws ought not be construed so as to ban all such materials. Sexually explicit telephone communications deserve First Amendment protection if they may help to save lives by deterring or replacing life-threatening behavior.

ARGUMENT

I. Sexually Explicit Commercial Telephone Communications Are Protected Under *Miller v. California* to The Extent That They May Help Prevent The Spread of a Life-Threatening Epidemic

By amendment to 47 U.S.C. § 223 (b) ("the Amendment"), Congress has legislated what the Solicitor General terms "an outright ban" on commercial telephone conversations that are adjudicated "obscene" or "indecent." See Jurisdictional Statement of Appellants, p. 24. This case presents this Court with the first opportunity to evaluate this legislation.

Inevitably this case will affect access to sexually oriented telephone communications by adults who wish to receive them.[1] Accordingly, attention must be given to a

[1] This is true whether the case ultimately adds primarily to substantive or procedural aspects of this Court's "obscenity"

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health crisis the course of which may be directly affected by the ruling in this case.

"Acquired Immune Deficiency Syndrome is an epidemic that has already killed thousands of people, mostly young, productive Americans." Surgeon General's Report, p. 3. The "HIV" viral infection which causes AIDS is transmitted through bodily fluids. Sexual contact is the predominant method of transmission. Medical technology cannot yet cure AIDS or vaccinate against it. Consequently, health professionals must focus on public education as the primary means of stemming further spread of the disease. As the National Academy of Sciences has noted, "education is critical to controlling the spread of HIV/AIDS". National Research Counsel, National Academy of Sciences, "*AIDS: Sexual Behavior and Intravenous Drug Use,*" at 26 (1989) (hereinafter "NAS Report").

An inescapable fact pervades any effort at AIDS awareness, education, or prevention. HIV infection poses inherent issues of human sexual behavior. It is part of the nature of the beast. Accordingly, AIDS education efforts must discuss sex "in clear, explicit language in the idiom of the target audience." NAS Report p. 19.

Health professionals agree that in order to stem the spread of AIDS it is necessary to do more than provide

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jurisprudence. Procedure often dictates outcome in obscenity litigation. Venue is one such example. As this Court observed in *Miller v. California*, 413 U.S. 15 (1973), a jury's evaluation of obscenity issues is a product of its own community standards brought to bear upon the obscenity issue.

the public with information; we must also "induce widespread behavior change." NAS Report p. 21. As the U.S. Government Accounting Office noted in a recent report on AIDS education:

> "[one] step in health education is the provision of persuasive motivators for risk reduction . . . Some research suggests that the motivating effect of fear is quite limited in some populations . . . Prior research suggests an effective alternative – positive motivators. Some motivators are symbolic, such as social approval for risk reduction and "eroticized" safer sex . . . "Eroticizing" is an effort to make safer sex more attractive so that people can more easily substitute safer sex . . . for the riskier sex . . . to which they may be more accustomed."

U.S. Government Accounting Office, *AIDS Education: Reaching the Population at Higher Risk*, September 1988, reprinted in AIDS Reference Guide, Section 1408, p. 9 (March 1989).

There is evidence indicating that so-called "Dial-A-Porn" plays a valuable role in this important facet of behavior modification. Sexually oriented telephone communications, of the type offered by cross-appellant, generated 180,000,000 calls in the year ending February 1984. *See Carlin Communications, Inc.* v. *FCC*, 749 F.2d 113, 114 (2d Cir. 1984). Thus, "however distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise they would have no value in the marketplace." *Marks v. United States*, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part).

The issue in the era of AIDS is far more serious than "entertainment." Dean Geoffrey R. Stone of the University of Chicago Law School, stated:

> "[T]he very fact . . . that there is a vast market in our society for sexually explicit expression suggests that for many people, this type of speech serves what they believe to be, it may be amusement, it m[a]y be containment, it may be sexual stimulation, it may be fantasy, whatever it is, many of us believe that this expression is to our own lives, in some way, valuable. That value should not be overlooked."

2 Attorney General's Commission on Pornography, Final Report 1269 (July 1986).

Research regarding sexual behavior, undertaken as an adjunct to the worldwide war against AIDS, strongly suggests that sexually explicit materials can play a positive role in reinforcing the public health directive to avoid unsafe sexual interaction with other persons. At the Fourth International Conference on AIDS in Stockholm, U.S. public health researchers reported on a study showing that sexually explicit materials presenting safer sex behavior in an affirmatively erotic manner was the most successful means of motivating persons to change from high-risk to low or no-risk behavior. This change in behavior is exactly what the Surgeon General and other health care professionals deem critical to stopping the spread of AIDS. *See* J. D'Eramo, M. Quadland, W. Shattls, R. Schuman and R. Jacobs, *"The 800 Men Project: A Systematic Evaluation of AIDS Prevention Programs Demonstrating the Efficiency of Erotic, Sexually Explicit Safer Sex Education on Gay and Bisexual Men at Risk for AIDS,"* summarized in CDC AIDS Weekly, p. 13 (October 24, 1988).

Indeed, there is direct evidence that some people consciously use "Dial-A-Porn" as a form of "safe sex" instead of engaging in sexual contact involving the exchange of bodily fluids. Records of the Foundation's safe sex workshops with gay men reveal that participants spontaneously named "phone sex" as a safe sex substitute in every recorded session. Memo to Foundation Staff from C. Frutchey, Assistant Director of Education (March 10, 1989). Several AIDS prevention organizations issue safe sex guidelines listing phone sex as a form of safe sex.[2]

The nation's obscenity laws and public health interest must be allowed to operate in harmony. Indeed, this Court's obscenity jurisprudence explicitly provides for such an accommodation. In *Miller v. California, supra*, this Court held that "obscene" materials do not include those which "taken as a whole [have] serious . . . political or scientific value." 413 U.S. at 24. In the age of AIDS, the "portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" has a potential life-saving value not anticipated when *Miller* was decided, 413 U.S. at 35. Surely sexually explicit materials which may help save lives – even if "patently offensive" to the majority – have profound political and scientific value deserving of First Amendment protection.

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[2] See, e.g. University of California, San Francisco's AIDS Health Project "Suggested Guidelines For Sensible Sex" (August, 1986) (listing "phone sex" and "pornography" as "no risk sex"); Gay Men's Health Crisis, "Eroticizing Safer Sex", p. 26 (listing "using telephone sex services" as a "safer sex act"). Gay Men's Health Crisis, based in New York City, is the nations largest AIDS service organization.

The scientific importance of encouraging the flow of explicit AIDS information, even when offensive to some, was noted by the National Academy of Sciences:

> "AIDS education efforts provide a number of examples in which *potentially effective prevention activities have become entangled in social conflicts* that caused . . . *a weakening of their message*. Specific controversies have involved restriction on the use of explicit language in educational materials [and the] *conflict between providing scientific information and promoting particular moral values* in AIDS prevention messages."

(NAS Report, p. 26, emphasis added)

To be sure, some might advocate simply eliminating sexual behavior they consider "immoral" as a means of stopping the spread of AIDS. Scientists have noted, however, that some high risk populations have dramatically reduced the spread of AIDS by "making changes in specific sexual practices instead of adopting monogamy or eliminating sexual contact altogether." NAS Report, p. 12. As discussed above, commercial telephone sex services are one such means through which individuals can alter their sexual behavior without risk of exposure to HIV.

That "Dial-A-Porn" is constitutionally protected speech gains further support from the caution which this Court has used in other obscenity cases. For example, this Court has emphasized that the capacity of material to spark sexual interest does not necessarily render it obscene. Materials which provoke "only normal, healthy sexual desires" are not obscene though they may appeal to a "prurient interest." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985). Furthermore, this Court forcefully reiterated, in *Fort Wayne Books, Inc. v. Indiana*, ___

U.S. ___, 57 U.S. Law Week 4180, 4184 (Feb. 21, 1989), that adequate procedural safeguards must insure a "searching" examination of sexually oriented materials before they are banished.

CONCLUSION

As the Court approaches the issues in this case, it should be mindful of the increased social value of sexually explicit materials in the throes of the AIDS crisis. Under present jurisprudence, "Dial-A-Porn" services which appeal to a "prurient interest" in a manner which may be considered "patently offensive" to the majority are nonetheless protected by the First Amendment to the extent that they may divert some individuals from life-threatening behavior.

Respectfully submitted,

LEONARD GRAFF*
BENJAMIN SCHATZ
National Gay Rights Advocates
540 Castro Street
San Francisco, CA 94114
(415) 863-3624

Attorneys for San Francisco AIDS Foundation, Amicus Curiae

*Counsel of Record

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Nos. 88-515 and 88-525

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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Appellant,

v.

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RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Appellees.

FEDERAL COMMUNICATIONS COMMISSION AND
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ATTORNEY GENERAL OF THE UNITED STATES,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Cross-Appellee.

On Appeals from the United States District Court for the Central District of California

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BRIEF AMICUS CURIAE OF HOME BOX OFFICE, INC. IN SUPPORT OF APPELLANT/CROSS-APPELLEE

DANIEL M. WAGGONER *
STUART R. DUNWOODY
CARYN L. ZIMMERMAN
DAVIS WRIGHT & JONES
1752 N Street, N.W.,
Suite 800
Washington, D.C. 20036
(202) 822-9775
and
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 622-3150
Counsel for Amicus Curiae

* Counsel of Record

Of Counsel:
JOHN S. REDPATH
HAROLD E. AKSELRAD
SHARI L. PATRICK
HOME BOX OFFICE, INC.
1100 Avenue of the Americas
New York, New York 10036

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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---

BRIEF AMICUS CURIAE OF HOME BOX OFFICE, INC. IN SUPPORT OF APPELLANT/CROSS-APPELLEE

INTEREST OF AMICUS CURIAE

Home Box Office, Inc. ("HBO") provides pay programming to cable television and other viewers throughout the United States. Although Section 223(b)[1] does

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[1] Section 223(b) of the Communications Act of 1934, as amended, is to be codified at 47 U.S.C. § 223(b). HBO limits its arguments in this brief to those supporting appellant's challenge to the statute's prohibition of indecent speech. HBO does not join in appellant's

not apply to pay television programming, HBO has a great interest in this and all other attempts to regulate speech. HBO itself has been the target of attempts to regulate indecent speech on other occasions.

HBO offers two pay services, HBO and Cinemax, that are designed to complement one another and to provide a full range of programming, including movies, special events, and sports, to viewers of all ages. HBO provides these two services throughout the nation by means of a scrambled signal transmitted via satellite. The scrambled signals are received both by local cable television systems, which retransmit them to their subscribers, and by individual viewers owning "earth stations" (dish antennae) that permit them to receive the satellite signals directly.[2] Persons wishing to view HBO or Cinemax not only must choose to purchase cable television or a dish antenna; they must also choose and pay for the HBO or Cinemax service before the signal will be descrambled and made viewable.[3]

The HBO and Cinemax services include programming tailored for adult audiences. This programming gen-

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challenge to the portion of the statute dealing with obscenity, as HBO does not transmit and has no interest in transmitting obscene programming. Indeed, it deserves emphasis that the speech cited as objectionable by the government, Government Br. at 6, perhaps could be addressed as obscene.

Written consent of the parties has been filed with the Clerk, as required by Rule 36.

[2] In some communities viewers also may receive the HBO and Cinemax services through microwave distribution systems.

[3] Cable subscribers and dish owners can obtain further control over viewing of cable service in their households through lock boxes that cable operators are required to make available to customers. 47 U.S.C. § 544(d)(2)(A). These lock boxes permit a cable subscriber or dish owner to prevent viewing of a particular cable service during periods selected by the viewer, enabling parents to control their children's access to programming.

erally airs later in the evening. Viewers are given notice of the content of the programming through printed program guides supplied to all subscribers of the services and through notices that precede the programming on the air. Examples of this programming include shows such as "Not Necessarily the News" and "On Location," comedies that often include satires of the occasionally indecent behavior of public officials and figures, frequently in a ribald manner, and movies such as "Wall Street" or "Frenzy," which use adult language and nudity as essential elements of an overall portrayal of society.

Several states and municipalities have enacted statutes and ordinances outlawing the transmission of "indecent" programming on cable television. HBO has joined in challenges to these restrictions, which uniformly have been invalidated as overbroad and as unduly restrictive means of serving the governmental interest. *See, e.g., Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); *Community Television v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987); *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985). Regulation of indecent speech has also been rejected by viewers and voters in jurisdictions ranging from the State of Utah, and the town of Vista, California, where voters rejected local initiatives to ban "indecent" cable programming, to the community of Mesquite, Texas, where a proposal to ban all R-rated material from the community's prospective cable system was rejected by referendum. *New York Times*, September 13, 1981, § 6, at 44, col. 1; *U.S. News & World Report*, Nov. 19, 1984, at 96.

HBO submits this brief to stress that prohibitions of indecent speech such as that imposed by Section 223(b) violate the First Amendment.[4]

SUMMARY OF ARGUMENT

Section 223(b) unconstitutionally bans speech that is fully protected by the First Amendment. Indecent speech plays an important role in artistic, literary, and political expression. Under the rationale for § 223(b), serious works of art or literature considered "patently offensive" by the public would be stripped of their First Amendment protection although this Court has repeatedly affirmed that such speech has First Amendment value.

Section 223(b) cannot survive the strict scrutiny applied to any restriction on fully protected speech. The statute's complete ban of indecent speech is not narrowly drawn to serve its purported goal of shielding children from such speech. This Court should reject the government's argument that only a total ban serves the government's interest in enhancing parental control over children's access to indecent speech. The government's definition of "indecent" also is too vague a standard to support imposition of criminal sanctions on expression.

If the Court upholds Section 223(b) despite its infirmities under the First Amendment, the Court should carefully limit its ruling to the medium of expression at issue here, telephone communication as employed by appellant/cross-appellee.[5]

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[4] HBO also submits this brief to point out the distinctive characteristics of its pay programming that distinguish it from other media.

[5] The medium employed by HBO, scrambled pay television, ensures that children may be shielded from indecent speech while still allowing access by adults. This creates a different First Amendment calculus that would render even more clearly unconstitutional a ban of indecent speech on pay television.

ARGUMENT

I. INDECENT SPEECH HAS FIRST AMENDMENT VALUE AND IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

By the terms of the government's proposed definition, indecent speech is not limited to that lacking serious literary, artistic, political or scientific value, but includes any speech that is patently offensive, whether it has such value or not. Government Br. at 18. *See also infra* at 6. Indecent speech under the government's definition does have such value, and is entitled to the full protection of the First Amendment.[6] *See infra* at 15.

Speech with serious artistic or literary merit often is considered indecent under some standard. Artists and writers often challenge existing mores, with the result that their work may be seen by the public at large as "patently offensive as measured by contemporary community standards." Works dealing with sex are especially likely to be considered patently offensive. Sexual content alone, however, does not strip a work of First Amendment protection. On the contrary,

> [t]he portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the valid problems of human interest and public concern.

Roth v. United States, 354 U.S. 476, 487 (1957) (footnote omitted). Indeed, the absence of a requirement that indecent speech appeal to the prurient interest threatens

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[6] The social value of indecent speech has also been affirmed by the electorate, which has rejected initiatives seeking to regulate indecent or R-rated cable programming. *See supra* at 3.

to sweep within its ambit many works in which sex is not the dominant theme, but only an incidental subject.[7]

History shows that many novels that would not have been deemed obscene at the time of their publication under the test set forth in *Miller v. California*, 413 U.S. 15 (1973), still would have qualified as indecent under the government's definition here. For example, the serious literary value of *Ulysses* and *Lady Chatterly's Lover* presumably would have prevented their being classified as obscene under the *Miller* test, but, because these books were ahead of the mores prevailing at the time, they likely would have been considered "patently offensive" and therefore indecent.

Indecent speech is often a component of political speech and social commentary. Political parody frequently seeks to puncture overblown egos by showing that politicians are subject to the same sexual drives and other bodily demands as ordinary mortals. The sexual peccadilloes of politicians and public figures have long been considered fair subjects for political comment. Indeed, comedic programming such as HBO's "Not Necessarily the News", may address these subjects through satire simply because the medium of humor is more effective and pointed. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (protection for "vehement, caustic and sometimes unpleasantly sharp attacks").

Political parody and commentary may be patently offensive simply because they address these themes. For example, the parody at issue in *Hustler Magazine, Inc. v. Falwell*, 108 S. Ct. 876 (1988), could be indecent under

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[7] *Pacifica* suggests that patently offensive elements must pervade a work before it can be characterized as indecent. The majority expressly reserved decision on whether "an occasional expletive" would justify regulation, 438 U.S. at 750, and Justices Powell and Blackmun, concurring, repeatedly emphasized that the broadcast at issue constituted a "verbal shock treatment" in which offensive elements were pervasive. *Id.* at 757 and 761.

the government's proposed definition because it described sexual and excretory activities in "an ad parody offensive to [Falwell] and doubtless gross and repugnant in the eyes of most." *Id.* at 879. *See Hustler Magazine, Inc. v. Falwell*, No. 86-1278, Pet. for Cert. at E-1 (Feb. 2, 1987) (reproducing parody). *See also Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 216 Cal. Rptr. 252 (1985) (action against HBO and others for a comedy routine in which Robin Williams commented on social issues in terms some listeners would consider highly offensive); *Papish v. Board of Curators*, 410 U.S. 667 (1973) ("indecent" cartoon protected by First Amendment); *Cohen v. California*, 403 U.S. 15 (1971) (the words "fuck the draft").

Indecent speech can also be a necessary part of academic discourse. In *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969), a magazine article that the Court found "scholarly, thoughtful and thought-provoking" used a word delicately described as a "highly offensive . . . , vulgar term for an incestuous son." 418 F.2d at 361. The court found the use of the word was "important to the development of the thesis and the conclusions of the author," and held that the plaintiff teacher's use of the word was protected by the First Amendment because "no proper study of the article could avoid consideration of this word." *Id.*

Finally, indecent speech is entitled to First Amendment protection because it may be the only way for a speaker to convey the precise message he wishes to deliver. As the Court recognized in *Cohen v. California*,

> much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content

> of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

403 U.S. at 26.

II. AS A REGULATION OF PROTECTED SPEECH, SECTION 223(b) IS SUBJECT TO STRICT SCRUTINY.

A. This Court Has Not Sanctioned Diminished Protection for Indecent Speech.

This Court has never held that restrictions on indecent speech or nonobscene speech with sexual content are subject to more lenient review than restrictions on other categories of protected speech. Of the Court's members reaching the constitutional issue in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), a plurality explicitly rejected the notion that restrictions on indecent speech are subject to less exacting scrutiny. Justice Powell, joined by Justice Blackmun, stated in his concurrence that:

> I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection.

438 U.S. at 761. Justice Brennan, joined by Justice Marshall, dissenting in *Pacifica*, rejected "the notion . . . that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court." *Id.* at 762-63. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), a majority of the Court expressed the view that all protected speech is entitled to the same degree of First Amendment protection. *See* 427 U.S. at 73 n.1 (Powell, J., concurring in result); *id.* at 85-86 (Stewart,

J., dissenting, joined by Justices Brennan, Marshall and Blackmun).[8] The distinctive attributes of broadcasting mean that *Pacifica* "does not readily translate into a justification for regulation of other means of communication." *Bolger*, 463 U.S. at 74.[9]

Similarly, *Young v. American Mini Theatres* is not authority for applying a test less exacting than strict scrutiny here. To the extent the decision is applicable, it demonstrates that § 223(b) is not a permissible time, place and manner restriction but rather a *total* ban. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (geographic restriction that provided alternative locales for speech). *See also American Mini Theatres*, 427 U.S. at 70 (plurality opinion) and at 82 n.6 (Powell, J., concurring) and *City of Renton*, 475 U.S. at 49-50 (regulations aimed at "secondary effects" of physical deterioration, not content of speech).[10]

Applying decreased scrutiny to restrictions on indecent speech is not only inconsistent with this Court's precedents, but would be difficult to administer and confine. The government fails to articulate the terms of the less

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[8] Nor does the distinguishing characteristic of indecent speech—its offensiveness—provide a basis for affording it lesser First Amendment protection. Rather, "offensiveness [is] 'classically not [a] justificatio[n] validating the suppression of expression protected by the First Amendment.'" *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983), quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977).

[9] HBO would contend that *Pacifica* was wrongly decided to the extent that it applied a definition of "indecency" that did not take into account the other merits of such speech and imposed content-based limitations on broadcasting. In any event, *Pacifica* does not support Section 223(b) because the statute bans indecent speech *in toto*, rather than channeling or otherwise limiting access to it.

[10] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), also does not offer support for more lenient review of indecent speech or speech with sexual content, as it involved a captive audience of students at a high school assembly.

exacting standard it claims would apply to indecent speech. Instead, it simply proposes an *ad hoc* justification for the result it seeks in this case. The government also fails to explain what principle would limit this less exacting standard of review to restrictions on indecent speech or prevent its application to restrictions on other types of speech that the legislature finds undesirable.

B. Section 223(b) Does Not Withstand Strict Scrutiny.

Section 223(b) must be subjected to the strict scrutiny imposed upon restrictions of protected speech.[11] Under this test,

> the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling interest.

Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980).

There is no doubt that the interest identified by the government—allowing parents to safeguard the well-being of children—is compelling. But Section 223(b) is not a precisely drawn means of serving that interest and therefore must be invalidated. The government's argument to the contrary would, if accepted, nullify the requirement that restrictions on speech be precisely drawn. *Cf. Carlin Communications v. FCC*, 787 F.2d 846, 855 (2d Cir. 1986); 749 F.2d 113, 121 (2d Cir. 1984) ("The Government bears the heavy burden of demonstrating that the compelling state interest could not be served

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[11] Although the government makes much of the large Congressional vote in favor of Section 223(b), this does not affect this Court's duty to review the statute and overturn it if necessary. The substantial margin in favor of the statute may merely reflect "that it is much more popular to be against sin than to be tolerant of it." *Smith v. United States*, 431 U.S. 291, 315 n.13 (1977) (Stevens, J., dissenting). In any event, it is precisely where restrictions on speech have majority support that this Court's duty of review is most important.

by restrictions that are less intrusive on protected forms of expression").

1. *A Total Ban Cannot be Justified by the Possibility That Measures to Shield Children Are Not Perfect in All Respects.*

From the FCC's determinations that "[n]o method guarantees that some enterprising minors will never hear the messages" and that "absolute impossibility of access to [dial-a-porn] services . . . is not feasible," the government concludes that the outright ban of Section 223 (b) is the narrowest available alternative to prevent children's access to indecent speech conveyed by telephone. This reasoning would justify complete bans of every type of expression thought to be harmful to children, for few if any regulations of speech short of a total ban can ensure that no speech will escape control.

Following the government's logic, a complete ban on sexually explicit but nonobscene books would be a regulation narrowly tailored to serve the compelling state interest of preventing access by children to such books. As this Court has observed,

> [f]or good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely-circulated books of this category [*i.e.*, sexually explicit] to reach the impressionable young and have a continuing impact.

Kaplan v. California, 413 U.S. 115, 120 (1973) (footnote omitted). *Accord*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 n.7 (1973). As a result, nothing short of a total ban could seal off children from such books. Under the government's theory, therefore, *Butler v. Michigan*, 352 U.S. 380 (1957), was wrongly decided because it overturned just such a complete ban of books on the ground that adults cannot be "reduce[d] to reading only what is fit for children," *Id.* at 383-84.

A complete ban on sexually explicit but nonobscene video tapes similarly would satisfy the government's test. Video cassette players are widespread and may be operated by an unsupervised child. Even if parents own no such tapes, or keep what tapes they do own under lock and key, there is no guarantee that their child will not see them at the home of a friend with less careful parents or by some other means outside the home. *Cf.* Government Br. at 33 n.22.

The undeniable truth that few, if any, measures short of a total ban can shield all children from all indecent speech at all times should not permit Congress to reject such measures and adopt instead the drastic alternative of a total ban on indecent speech. In this case, the FCC has identified numerous less restrictive alternatives to a complete ban that would serve the government's interest in protecting children.[12] *See* Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order, 2 FCC Rcd. 2714 (1987); Second Report and Order, 50 Fed. Reg. 42,699 (1985); First Report and Order, 49 Fed. Reg. 24,996 (1984). That these alternatives are not perfect in all respects should not be allowed to transmogrify the most drastic regulation—the total ban of Section 223(b)—into a narrowly tailored restriction.

2. *Total Bans on Speech Infringe the Right of Parents to Select Speech Heard by their Children.*

Section 223(b) also is not precisely drawn because it deprives parents of the chance to choose the speech to be heard by their children. The interest of parents in directing the upbringing of their children is entitled to

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[12] Even more effective alternatives are available to insure that indecent speech on pay television does not reach unsupervised children but remains available for adults. *See* Note 3 *supra* and text at 18-19, *infra*.

considerable weight. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). To the extent speech is regulated, therefore, it should be with the aim of giving parents tools to control children's access to speech, not to cut off access altogether.

In *Ginsberg v. New York*, 390 U.S. 629 (1968), for example, the Court upheld a ban on selling materials to minors, while specifically noting that the statute "does not bar parents who so desire from purchasing the magazines for their children." *Id.* at 639 (footnote omitted). Similarly, in *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 (D.C. Cir. 1988), the Court of Appeals properly emphasized that "the government does not propose to act *in loco parentis to* deny children's access *contrary to* parents' wishes." (Emphasis in original, footnote omitted.) *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (improper to suppress speech "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them"). The total ban of Section 223(b) thus contradicts rather than supports the governmental interest of enhancing parental control over children's access to speech.

C. Availability of Indecent Speech Elsewhere Does Not Justify a Complete Ban on Any Medium.

Section 223(b)'s prohibition of indecent speech conveyed by telephone is not saved by the availability of indecent speech on other media. This Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternate means of expression." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. at 540 n.10. " 'One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Bolger*,

463 U.S. at 69 n.18, quoting *Schneider v. State*, 308 U.S. 147, 163 (1939).[13]

Nor can the prohibition be justified on the ground that a speaker can convey the same message using inoffensive speech. The message a speaker wishes to convey is often inseparable from words, including indecent ones, that he chooses. As a result, "[t]his Court has recognized that words are not fungible, and that the suppression of particular words 'run[s] a substantial risk of suppressing ideas in the process.'" *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S. Ct. 2971, 2978 (1987), quoting *Cohen v. California*, 403 U.S. at 26.

III. THE TERM "INDECENT" IS TOO VAGUE FOR THE IMPOSITION OF CRIMINAL SANCTIONS ON SPEECH.

Where protected speech is at issue, the First Amendment demands that regulations be "precisely drawn." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980). Section 223(b) does not even attempt to define indecent speech. Nor does *Pacifica*, as the government contends, supply meaning to the term "indecent."[14] In any event, the government's proposed definition of "indecent" is unacceptably vague for regulation of protected speech.

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[13] The government's theory, if adopted, would support a ban on indecent speech in movie theaters because some individuals might be able to view such movies on video cassette players.

[14] The FCC defined indecency as follows:

> "[T]he concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."

Pacifica, 438 U.S. at 732, quoting 56 FCC 2d at 98.

A. *Pacifica* Does Not Support the Government's Proposed Definition of Indecent Speech.

Section 223(b) imposes criminal sanctions on "indecent" speech. Congress may have sought to use the term as defined in *Pacifica*, Government Br. at 18, but that decision offers no precise definition of "indecency." The plurality opinion in *Pacifica* quoted the definition of "indecent" used in the opinion and order of the FCC [15] but was careful not to adopt it. The plurality stressed that the Court "'reviews judgments, not statements in opinions,'" 438 U.S. at 734 (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)), and limited its review to "whether the Commission has the authority to proscribe this particular broadcast." 438 U.S. at 742 (plurality opinion). *See also Id.* at 754-56 (Powell, J., concurring).

The government here proposes to define indecent speech as that which "'"describes, in terms patently offensive as measured by contemporary community standards for the * * * medium, sexual or excretory activities and organs."'" Br. at 18 (quoting *Pacifica*, 438 U.S. at 732 (quoting FCC definition)). The government concedes that, under its proposed definition, indecent speech may have serious literary, artistic, political or scientific value and need not appeal to the prurient interest.

B. The Government's Proposed Definition of "Indecent" Is Unconstitutionally Vague.

The definition of "indecent" that the government proposes is excessively vague for a regulation imposing

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[15] The government does not even adopt the FCC definition of "indecent" *in toto*, as the definition it proposes omits the time of day component of the FCC definition. Government Br. at 19 n.12. The time of day component was a critical part of *Pacifica*'s review of indecency, and this Court emphasized that "context is all-important," 438 U.S. at 750, and specifically reserved decision as to the constitutionality of an around-the-clock ban on broadcast indecency. *Id.* at 760 n.28.

criminal sanctions on speech. The central characteristic of indecent speech under the government's proposed definition—patent offensiveness as measured by contemporary community standards—fails to offer sufficiently precise guidance to those seeking to avoid the criminal sanctions of Section 223(b). It simply is not clear which descriptions will be deemed "patently offensive" for a given medium under contemporary community standards.

The vagueness created by the "patent offensiveness" standard is especially acute for a national programmer. Communities vary widely throughout the United States. What is patently offensive in a small town in Utah may differ from what is patently offensive in a small town in Nevada; the standards for patent offensiveness in both of these towns may be substantially different from that prevailing in Los Angeles. Determining what is "patently offensive" in the most sensitive community served by a national distributor can be extremely difficult, if not impossible.[16]

Miller v. California, 413 U.S. 15, 24 (1973), also refers to "patent offensiveness" under community standards in its definition of obscenity. But this test is unconstitutional as applied to indecent speech because "patent offensiveness" is the primary defining characteristic of indecency. Obscenity, by contrast, is more precisely defined by the requirements that it appeal to the prurient interest, that it lack serious literary, artistic, political or scientific value, and that obscenity laws "specifically define[]" the patently offensive sexual conduct proscribed

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[16] A nationwide programmer such as HBO could not tailor its programming to meet the needs of each individual community because it distributes programming via satellites that cover broad regions of the country. A "community standards" test for indecency, if applied to HBO, would effectively reduce programming to the level acceptable to the most sensitive community, thereby denying less sensitive communities access to speech that is acceptable to them.

by the laws. *Id.* Indeed, Justice Stevens, the author of the lead opinion in *Pacifica*, recognized in an earlier case that "patent offensiveness" is too vague a standard upon which to base imposition of criminal sanctions: "The line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." *Smith v. United States*, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting). *See also Pacifica*, 438 U.S. at 739 n.13, and 750 (reserving decision as to whether indecent speech could be the basis of a criminal prosecution) (majority portion of lead opinion). *Accord Coates v. Cincinnati*, 402 U.S. 611 (1971) (statute outlawing "annoying" conduct unconstitutionally vague).

The ambiguity of Section 223(b) is all the more intolerable because it impinges upon freedom of expression where "a greater degree of specificity [is demanded] than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

IV. EVEN IF THIS COURT FINDS THAT THE RESTRICTIONS OF SECTION 223(b) ARE APPROPRIATE FOR TELEPHONE COMMUNICATION, SIMILAR RESTRICTIONS WOULD NOT BE JUSTIFIED ELSEWHERE.

If, despite the arguments set forth above, the Court upholds Section 223(b), it should carefully limit its decision to the medium at issue—interstate commercial telephone communication—and reaffirm its previous holdings that each restriction on expression must be analyzed according to the particular characteristics of the medium to which it applies, on a fully developed factual record. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986) (refusing to rule on First Amendment issues concerning cable television in the absence of a fully developed record).

The Court recognized in *Pacifica* that "each medium of expression presents special First Amendment prob-

lems," 438 U.S. at 748, and that regulation of indecency depends on the medium on which it appears. The concept of indecency "requires consideration of a host of variables," including "[t]he time of day . . ., the composition of the audience, and differences between radio, television, and *perhaps closed-circuit transmissions* . . . ." *Id.* at 750 (footnote omitted) (emphasis added). *See also Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) ("The movie picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself . . . .").[17]

The necessity for a separate analysis of each medium is demonstrated well by the courts' rejection of regulation of indecency on pay television programming. For instance, this Court's summary affirmance in *Wilkinson v. Jones*, 480 U.S. 926 (1987), *aff'g Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'g Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), tacitly recognized the special characteristics of cable television that make bans of indecent speech on that medium unconstitutional.[18] Those characteristics include the following: (1) the affirmative choice required to acquire basic cable service; (2) the separate choice to add and pay a premium for services such as HBO; (3) the "scrambling" that prevents viewing of premium channels without payment of that separate fee; (4) the availability of "lock boxes" which allow parents or other subscribers to block access to programming, even if the serv-

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[17] This is not to suggest that regulation of indecency would be constitutional as to other media, but only that each medium must be separately analyzed.

[18] *Wilkinson* involved a constitutional challenge to the Utah Cable Television Programming Decency Act, which authorized state officials to bring nuisance actions against persons distributing indecent material within the state over a cable television system or via pay-per-view television programming.

ice has been paid for and the programming is no longer "scrambled"; and (5) the general availability of guides that provide advance notice of programming. 611 F. Supp. at 1113 (quoting Memorandum for the Federal Communications Commission as amicus curiae at 5-6).[19] *See also Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (*Pacifica* cannot be extended to uphold city ordinance regulating distribution of indecent material through cable television because cable television is not as intrusive or as accessible to children as broadcast television).

These characteristics of pay programming are but examples of the many differences among media that distinguish both the degree to which viewers or listeners exercise choices and the extent to which government should be allowed to intervene in those choices. Each medium, too, may change over time in its technology of distribution and the manner in which viewers or listeners gain access to programming. *Compare Carlin Communications, Inc. v. FCC* (Carlin I), 749 F.2d 113 (2d Cir. 1984) with *Carlin Communications, Inc. v. FCC* (Carlin III), 837 F.2d 546 (2d Cir. 1988), *cert. denied*, No. 88-37 (Oct. 31, 1988) (changes in ability of telephone network to control access to dial-it services). As this Court has recognized, these distinctions preclude broad conclusions and mandate that any affirmance of Section 223(b) should not extend beyond its present application to indecent speech as currently distributed over the existing telephone system.

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[19] The availability of a lock box may be the most important characteristic distinguishing cable television from telephones. These lock boxes, which cable systems are required by statute to provide to their subscribers upon request, 47 U.S.C. § 544(d)(2)(A), and which are also available to dish owners, permit a subscriber to prohibit viewing of a particular cable service during periods selected by the subscriber. A parent can use the lock box to shut off access to a given channel at all times except when he or she is present, or can review program guides to locate programming from which he wishes to shield his children, and restrict access during those hours.

CONCLUSION

The judgment of the district court holding Section 223(b) unconstitutional should be affirmed.

Respectfully submitted,

DANIEL M. WAGGONER*
STUART R. DUNWOODY
CARYN L. ZIMMERMAN
DAVIS WRIGHT & JONES
1752 N Street, N.W.,
Suite 800
Washington, D.C. 20036
(202) 822-9775
and
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 622-3150
Counsel for Amicus Curiae

Of Counsel:
JOHN S. REDPATH
HAROLD E. AKSELRAD
SHARI L. PATRICK
HOME BOX OFFICE, INC.
1100 Avenue of the Americas
New York, New York 10036

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* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, Attorney General of the United States

FEDERAL COMMUNICATIONS COMMISSION AND RICHARD L. THORNBURGH, Attorney General of the United States,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF AMICUS CURIAE OF JOHN W. OLIVO, JR.

ROBERT T. PERRY*
JOHN W. OLIVO, JR.,
Of Counsel
Media Law Clinic
New York Law School
57 Worth Street
New York, New York 10013
(212) 431-2160

**Counsel of Record*

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STATEMENT OF INTEREST

John W. Olivo, Jr., an attorney, and inventor in the field of telephone communications, holds a Bachelor of Science degree in Electrical Engineering from Lafayette College and has electrical engineering experience. In October of 1986, while a member of the New York Law School Media Law Clinic, Amicus submitted a proposal to the Federal Communications Commission (Commission or FCC) that subsequently became known as the "beep-tone" method. Under this proposal, an adult dial-it message provider would insert at the beginning of each recorded message a "beep-tone" which, when heard by a "beep-tone" listening device located on the caller's premises, would cause the call to be blocked. In this way, parents could limit their children's

access to adult messages like those offered by Sable Communications of California, Inc., appellee and cross-appellant, at a very modest cost.

Although the beep-tone method proposed by Amicus received qualified support from several major telephone companies, the FCC summarily rejected it without ever considering its technical merit. In Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2nd Cir. 1988), cert. denied, No. 88-37 (Oct. 31, 1988), the Second Circuit, after commenting on the lack of evidentiary support for the FCC's rejection of the beep-tone method, directed the FCC to reopen its proceeding when a prototype beep-tone device became available.

Since that time, a beep-tone device has been manufactured in

prototype and has been tested to ensure dependability. It is presently the subject of a United States Patent Application, and two claims directed to telephone usage of the beep-tone device have been allowed by the United States Patent and Trademark Office. To-date, however, the FCC has failed to consider the device's applicability, and even neglected to offer it to Congress as an alternative when Congress held its fact-finding hearings prior to enacting the current version of Section 223(b) of the Communications Act of 1934, 47 U.S.C. (Supp. III) §223(b).

Amicus submits this Brief for the purpose of informing the Court that there currently exist feasible and effective methods for restricting

children's access to adult messages, such as the beep-tone method, and to persuade the Court that an outright ban on "indecent" interstate telephone communications for commercial purposes is not the least intrusive measure for advancing the government's interest in protecting the well-being of children.

Both parties have consented to the filing of this brief.

INTRODUCTION

Section 223(b) of the Communications Act of 1934, as amended in August 1988, 47 U.S.C. (Supp. III) §223(b), prohibits any person from making "obscene or indecent" interstate telephone communications for commercial purposes. The object of Section 223(b) is to protect children from adult message services provided

for a fee over the telephone. As the government observes, the current version of Section 223(b) banning "indecent" adult message services rests, in large measure, on the judgment of Congress "that there was no sufficiently effective technological method of eliminating the access of children to dial-a-porn short of an outright ban." (Govt. brief at 13). That judgment was "illuminated by the FCC's experience in this area" under the prior version of Section 223(b) (Govt. brief at 20).

Enacted in 1983, the prior version of Section 223(b) prohibited any person from using telephone facilities to make "obscene or indecent" interstate telephone communications "for commercial purposes to any person under eighteen

years of age or to any other person without that person's consent". 47 U.S.C. §223(b)(1) (Supp. IV 1986). That enactment provided, however, an affirmative defense to prosecution if the defendant restricted access to adults "in accordance with procedures which the Commission shall prescribe by regulation". 47 U.S.C. §223(b)(2) (Supp. IV 1986).

As the government further observes, the FCC over the next four years sought to devise regulations prescribing methods under which adult message services could be offered without being readily accessible to children. (Govt. brief at 8-12). The first and second set of regulations promulgated by the FCC under Section 223(b) were set aside in whole or in part by the Second

Circuit and remanded to the Commission. Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) (Carlin I); Carlin Communications, Inc. v. FCC, 787 F.2d 846 (2d Cir. 1986) (Carlin II).

Following remand in Carlin II, the FCC issued its Third Notice of Proposed Rulemaking in July 1986, 51 Fed. Reg. 26,915 (1986), inviting public comment on methods for restricting children's access to adult message services. In response to that invitation, Amicus, who was then a student enrolled in the New York Law School Media Law Clinic, submitted a novel proposal known as the "beep-tone" method which was described by the Second Circuit as follows:

> [Olivo] proposed that [an adult message] provider preface its

> message with a three-part tone burst designed to activate a listening device installed at the customer's premises. Upon "hearing" the tone burst, the device would immediately disconnect the telephone, so that the caller could not hear the message. A "listening" device could be installed at the terminal block or at individual outlets. While such devices are not yet manufactured, Olivo suggested similar technology presently costs between $5 and $10. Southwestern Bell, Bell Atlantic, and NYNEX commented favorably on Olivo's proposal, though the latter two added that the system needed further study.

Carlin Communications, Inc. v. FCC, 837 F.2d 546, 554 (2d Cir. 1988) (Carlin III), cert. denied, No. 88-37 (Oct. 31, 1988).

Seven months later, in May 1987, the FCC released its third set of regulation implementing Section 223(b). Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene

Materials, Third Report and Order, 2 F.C.C. Rcd 2714 (1987) (Third Report). Although prescribing access codes and message scrambling, the FCC rejected the beep-tone method proposed by Amicus after giving that proposal only cursory consideration in a single footnote. Id. at 2724 n.13. The FCC, for example, assumed that the "beep tone device would [not] be employed in a significant percentage of households", because an Ameritech study had shown that only a small percentage of households would purchase programmable blocking devices for use in their homes if the price were other than nominal. Id. at 2717-2718. The Ameritech study, however, did not focus on the household demand for the simpler, less expensive beep-tone device.

The Commission's third set of regulations was challenged in the Second Circuit, which issued Carlin III in January 1988. Although upholding these regulations, the Second Circuit ruled that the Commission had failed to give adequate consideration to the beep-tone method:

> Theoretically, a beep-tone device, suggested by the Media Law Clinic of New York Law School and qualifiedly supported by three telephone companies, would avoid the problems associated with access codes and scrambling, at a relatively low cost for providers and customers. The Commission observed that since it has not been shown that a significant percentage of households would use this beep-tone device, the device would not be effective in achieving the purposes of Section 223, a conclusion having little or no evidentiary support in the record. However, as the Commission noted, the beep-tone device has not actually been manufactured, even in prototype. As some carriers

> raised questions concerning its technical feasibility, the Commission held that "substantial limitations exist with establishment of this device as a regulatory requirement at this time." 2 F.C.C. Rcd at 2724 n. 13 (emphasis added). When such a device is manufactured in prototype so that its scientific feasibility can be determined, we direct the FCC to reopen its proceedings to consider the feasibility, costs and benefits of adding its use as an optional defense. In this way, the Government can fulfill its "heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression." Carlin I, 749 F.2d at 121.

Carlin III, 837 F.2d at 556.

Since this decision, a prototype of the beep-tone device has been constructed under the direction of Amicus by Telcom Design, Inc., an electronics laboratory in Seattle, Washington. This beep-tone prototype has passed a talk-off immunity test designed to ascertain whether or not

devices can be falsely triggered by human voices, and, in January of 1989, two claims directed to the beep-tone device were allowed by the United States Patent and Trademark Office in patent application Serial Number 091,646, filed August 31, 1987. The FCC, however, still has not considered the device and probably never will now that the April 1988 version of Section 223(b), which eliminates the previous version's defenses, has been enacted.

SUMMARY OF ARGUMENT

While there are many reasons why Section 223(b), insofar as it bans "indecent" interstate telephone communications for commercial purposes, violates the First Amendment, Amicus focuses on the flawed legislative finding on which Section

223(b) rests: that no sufficiently effective technological method exists to restrict children's access to adult messages. Because this finding is exclusively based on the FCC's experience, and because the Commission did not fairly consider at least one technological alternative, namely the beep-tone method proposed by Amicus, this Court need not, and should not, defer to the legislative finding (Point I). Moreover, because Congress and the Commission failed to assess the level of effectiveness of various technological methods considered, the ban on "indecent" telephone communications may afford only marginal protection of children beyond the protection afforded by technological alternatives such as the beep-tone method. And, because

such marginal protection clearly does not outweigh the significant intrusions on the First Amendment rights of the adult population, the ban is constitutionally impermissible (Point II). Finally, the beep-tone method is not only a feasible and effective way to restrict children's access to adult messages, but is also one of the least intrusive, technological regulatory measures available (Point III).

I. THE COURT SHOULD NOT DEFER TO THE JUDGMENT OF CONGRESS AND THE COMMISSION THAT NO FEASIBLE AND EFFECTIVE TECHNOLOGICAL METHODS EXIST TO RESTRICT CHILDREN'S ACCESS TO ADULT MESSAGES.

In First Amendment cases, the Court has typically "afford [ed] great weight to the decision of Congress and the experience of the Commission". Columbia Broadcasting

System, Inc. v. Democrative National Committee, 412 U.S. 94, 102 (1973). But deference to the judgment of Congress and the Commission is not unlimited. The Court must carefully scrutinize that judgment whenever "the Commission has not fulfilled its task with appropriate sensitivity to the interests of free expression." Id. at 103. In such cases the Court must independently assess the legislative findings on which the judgment rests, because "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978).

The Government's argument for an across-the-board ban on "indecent" messages rests, in large measure, on

the conclusion reached by Congress "that there was no sufficiently effective technological method of eliminating the access of children to dial-a-porn short of an absolute ban." (Govt. brief at 13). To be sure, there were numerous statements to that effect made during the House and Senate debates prior to enactment of Section 223(b). See, e.g. 134 Cong. Rec. H1691 (daily ed. April 19, 1988) (Statement of Rep. Bliley) ("it became clear that there was not a technological solution that would adequately and effectively protect our children from the effects of this material. We looked for effective alternatives to a ban -- there were none"). But colloquy statements, in and of themselves, do not form an

adequate evidentiary basis for the critical legislative finding.

Nor, for that matter, does the record generated during the Fall 1987 Congressional subcommittee hearing. See generally, Telephone Decency Act of 1987: Hearings on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. (1987) ("1987 Hearing"). Concededly, the need for examination of technological solutions to the adult message problem was not lost on the subcommittee holding the hearing. As its chairman stated in his opening remarks, "technology may well be the key in delicately balancing the interests of free speech and the protection of children." 1987 Hearings at 2 (opening statement of

Rep. Markey). Nevertheless, despite the chairman's announcement that a "very significant focus" of the hearing would be on the "technological regulatory alternatives proposed by the FCC and others", ibid., there was, in fact, very little focus on the technological issues during the hearing. Instead, much of the testimony given at the Fall 1987 hearing consisted of proclamations against adult messages, general expression of concern about the gravity of the problem of children's access to such messages, and questions as to how large the adult message industry was and why telephone companies could not simply refuse to serve adult message providers.

More importantly, one of the potential technological solutions -- the beep-tone method -- was never even considered by Congress during the course of that hearing. Indeed, only one witness even mentioned the existence of the beep-tone method.[1] The other witnesses, including Diane S. Killory, the Commission's general counsel, all completely ignored this potential technological solution in

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[1] Barry W. Lynn, legislative counsel for the American Civil Liberties Union, briefly alluded to the beep-tone method in his prepared written statement. 1987 Hearings at 44. That statement provided, among other things, a broad overview of the available technology. During Mr. Lynn's discussion of customer premises equipment (CPE) blocking devices, one paragraph was offered on Amicus "alternative solution". Id. A short explanation of how the beep-tone method works was given and the technology was described as already in use in other areas of telephone operations. Mr. Lynn's statement thereafter returned to its discussion of CPE blocking devices and their prices, never again mentioning the beep-tone's applicability.

their testimony and prepared written statements. 1987 Hearings at 191-214 (testimony of Diane S. Killory). Indeed, Ms. Killory's failure to discuss the beep-tone method is especially troublesome, given that the Second Circuit had questioned the Commission's rejection of the beep-tone method only nine days before the subcommittee hearing, during the oral argument in Carlin III.

It is thus clear that the critical legislative finding -- that no feasible and effective technological solutions existed to restrict children's access to adult messages -- was not, as the Government asserts, based upon "extensive consideration [by Congress]" (Govt. brief at 19-20), but, rather, was based exclusively on the FCC's experience in

this area. And little or no deference is owed the Commission's experience since it "[did] not fulfill its tasks with appropriate sensitivity to the interests of free expression". Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 103.

The Commission, in particular, rejected the beep-tone method even though, as the Second Circuit observed, the beep-tone method "[t]heoretically ... would avoid the problems associated with access codes and scrambling at a relatively low cost for providers and customers." Carlin III, 837 F.2d at 556. The Second Circuit also found the Commission's conclusion that demand for beep-tone devices would be insignificant to "hav[e] little or no

evidentiary support in the record." Ibid. Indeed, with the successful manufacture and testing of the beep-tone device, what had been the Commission's only non-frivolous reservation about the beep-tone method -- that no such device was currently manufactured -- is no longer valid.[2]

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[2] Even this reservation was dubious because the technology on which the beep-tone method is based had for years been routinely employed by telephone companies in customer premises equipment used to remotely disconnect a subscriber from the telephone network and allow remote loop and line testing prior to dispatching a repair person to the subscriber's premises.

II. A BAN ON "INDECENT" ADULT MESSAGES IS IMPERMISSIBLE SINCE IT MAY ONLY AFFORD A MARGINAL DEGREE OF PROTECTION BEYOND THAT AVAILABLE VIA EXISTING TECHNOLOGICAL METHODS FOR RESTRICTING CHILDREN'S ACCESS TO THESE MESSAGES

The critical legislative finding -- "that there was no sufficiently effective technological method of eliminating the access of children to dial-a-porn short of an outright ban" (Govt. brief at 13) -- is also fatally flawed in another respect. While Congress and the Commission judged the various technological alternatives to an outright ban ineffective, they failed to articulate the level of effectiveness expected of the methods proposed, including the beep-tone method, and thus left unclear the degree of additional protection expected from

an outright ban on "indecent" messages.

The Court confronted a narrower ban on dissemination of adult materials in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983). At issue was the federal statute banning the mailing of unsolicited advertisements for contraceptives. Noting that "parents already exercise substantial control over the disposition of mail once it enters their mailboxes" and that "[they] must already cope with the multitude of external stimuli that color their children's perception of sensitive subjects", the Court declared the ban to be impermissible:

> This marginal degree of protection is achieved by purging all mailboxes of unsolicited material that is entirely suitable for adults. We have previously made clear

> that a restriction of this scope is more extensive than the Constitution permits, for the government may not "reduce the adult population ... to reading only what is fit for children." Butler v. Michigan, 352 U.S. 380, 382 (1957). The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.

Id. at 73-74 (footnote omitted).

Similarly, in the case at bar, parents already exercise substantial control over the telephone in their homes, and presumably may exercise additional control through some of the technological methods for limiting their children's access to adult messages. Likewise, their children are already faced with a multitude of external stimuli that may deal with the very same subjects as adult messages. The ban on "indecent" adult messages thus may afford only a "marginal degree of

protection," id. at 73, to children beyond that available through the various technological methods found by Congress and the Commission to be lacking.

Given that real possibility, it was, therefore, incumbent on both Congress and the Commission to make findings on the level of effectiveness of each proposed technological method for limiting children's access to adult messages. While the Commission concluded that certain methods, e.g., the access code method, would provide a "high degree of effectiveness", Third Report, 2 F.C.C. Rcd at 2724 n.14, neither Congress nor the Commission made any findings on the level of effectiveness of other technological methods, including the beep-tone method.

Because no such findings were ever made, Congress may not enact an outright ban on "indecent" messages and reduce the level of discourse available over the telephone to that which would be suitable for a sandbox.

III. THE BEEP-TONE METHOD IS A FEASIBLE AND EFFECTIVE WAY TO RESTRICT CHILDREN'S ACCESS TO ADULT MESSAGES WITH MINIMAL INTRUSION ON THE FIRST AMENDMENT RIGHTS OF THE ADULT POPULATION

Notwithstanding the failure of Congress and the FCC to consider the merits of the beep-tone method, that method is both a feasible and effective way to restrict children's access to adult messages. Not only have three major telephone companies and the Second Circuit commented favorably on the beep-tone method, Carlin III, 837 F.2d at 554, 556, but

the United States Patent and Trademark Office (PTO) has recently allowed two patent claims directed towards telephone usage of the beep-tone method. (See p.12 supra.) This not only confirms the feasibility and effectiveness of the beep-tone method, 35 U.S.C. §112 (1988) ("in order for a claim to be allowed, [the applicant's disclosure] must enable any person skilled in the art to which it pertains ... to make and use the ... invention"), but also establishes that it is "new and useful", 35 U.S.C. §101 (1988), and further "novel" and "non-obvious" pursuant respectively to 35 U.S.C. §102 (1988) and 35 U.S.C. §103 (1988). See Bonito Boats, Inc. v. Thunder Craft Boat, Inc., 109 S.Ct. 971, 976 (1989). The latter finding by the

PTO further confirms that the beep-tone method was not among the existing technological alternatives previously rejected on the merits by Congress and the FCC.

As the Second Circuit observed in Carlin I, because a ban on "indecent" telephone communications is content-based, "[t]he Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that any less intrusive on protected forms of expression." Carlin I, 749 F.2d at 121. In Carlin III the Second Circuit made clear that the FCC's reconsideration of the beep-tone method was necessary for the Govern-

ment to carry that burden. Carlin III, 837 F.2d at 556.[3]

The beep-tone method is far less intrusive than the methods prescribed by the FCC in its Third Report. It imposes only modest cost on adult dial-it message providers and telephone subscribers. The former merely need to preface their recorded messages with the specified beep-tone, and the latter merely need to purchase and install a nominally priced beep-tone device.[4]

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[3] Amicus recognizes that the government has urged the Court to apply a lower level of scrutiny than the Second Circuit applied in Carlin III (Govt. brief at 24-25). Amicus disagrees and concurs in the argument for strict scrutiny advanced by Sable, appellee and cross-appellant.

[4] The beep-tone device might even be "integrated" into the telephone handset, thus reducing its price even further. Such integrated beep-tone devices would be difficult, if not impossible, for

(continued...)

By contrast, the access code method imposes substantial financial costs on each adult message provider. Fabulous Associates, Inc. v. Pennsylvania Public Utility Commission, 693 F.Supp. 332, 338 (E.D. Pa. 1988) ("Fabulous Associates"); Third Report, 2 F.C.C. Rcd at 2724-25 n.23. Moreover, because one must apply for an access code, "access to adult messages [is conditioned on] loss of anonymity as far as message providers are concerned". Fabulous Associates, 693 F.Supp. at 338. That condition would have a substantial chilling effect, given "the societal opprobrium associated with dial-a-porn messages and the probable

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[4](...continued)
children to disable. Even "stand-alone" beep-tone devices would be difficult to disable if enclosed in lockable boxes.

undesirability of having one's name and address at the disposal of message providers and other third parties." Id. (footnote omitted). See also Carlin II, F.2d at 856 n.7 ("potential chilling effect"); but cf. Carlin III, F.2d at 557 (declining to consider "potential chilling effect" argument).

Likewise, message scrambling would impose greater costs on both adult message providers and their customers than would the beep-tone method. Third Report, 2 F.C.C. Rcd at 2720-21. Moreover, unless a uniform nationwide adult message scrambling technique were adopted, potential customers might have to buy separate descramblers for each adult dial-it message service they call.

Some local telephone companies, either voluntarily or pursuant to a directive from a state public utilities commission, have reassigned adult message providers to an exchange with a separate prefix, to which access may be pre-blocked at the telephone subscriber's request. Fabulous Associates, 693 F.Supp. at 339. While the restricted exchange method is clearly a less restrictive alternative than the access code method, it nevertheless has several restrictive features not inherent in the beep-tone method. Placement of any message provider into the restricted exchange will necessarily limit the message provider's potential audience because many telephone subscribers will request that access to that exchange be pre-blocked. The

placement decision, which is typically made by the telephone company, will, therefore, have a significant impact on the size of the message provider's potential listening audience. If "state action" is shown, there may even be an impermissible prior restraint. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 n.8 (1975) (classification of musical as not in community's "best interest" placed inevitable restraint on speech). Even if no state action is present, the telephone company has become involved in content-based decisions, a significant and unfortunate departure from longstanding common carrier tradition. I. Pool, Technologies of Freedom 75 (1983). In short, the telephone line is no longer a

transparent medium between caller and receiver.

By contrast, the beep-tone method leaves all of the decision-making to adult message providers and telephone subscribers. If an adult message provider prefaces its recorded message with a specified beep-tone and a telephone subscriber installs a beep-tone device, the message provider and telephone subscriber will never connect over the telephone line. Hence, the common carrier remains totally transparent in the access restriction process.

In short, the beep-tone method proposed by Amicus is a feasible and effective way to restrict children's access to adult message services. It provides a sufficiently reliable way to separate children from adults who

wish to call adult message services.[5] And it does so with minimal intrusions on the First Amendment rights of the adult population and with only nominal burdens on parents.

CONCLUSION

For the reasons stated, the order of the district court should be

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[5] In upholding the FCC's ban on the broadcast of indecent material on daytime radio, the Court recognized the inability to separate children from adults in the viewing and listening audience. FCC v. Pacifica Foundation, 438 U.S. 726, 749-750 (1978). Amicus wishes to point out to the Court that the beep-tone method may also be employed in the broadcast and videotape media. An adult radio broadcast might, for example, emit an inaudible beep-tone signal continuously or intermittently during the broadcast. Radios with integrated and selectively activated beep-tone devices might then block reception of the broadcast. Regarding the videotape medium, the rating of a program may be encoded on the tape itself. Then, a parent can preset, via lock and key, the family videotape player to only playback programs with certain ratings. Thus, a parent can limit their children's access to adult videotapes when the parent is not physically present.

affirmed insofar as it enjoins enforcement of the statute prohibiting "indecent" speech.

Dated: March 23, 1989

Respectfully submitted,

Robert T. Perry

Robert T. Perry*
John W. Olivo, Jr.,
Of Counsel
Media Law Clinic
New York Law School
57 Worth Street
New York, New York 10013
(212) 431-2160

Attorneys for
John W. Olivo, Jr.

*Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH, ATTORNEY GENERAL
OF THE UNITED STATES,
Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF AMICI CURIAE JANE ROE, JOHN DOE, INC., AND THE CONSENTING ADULTS TELEPHONE RIGHTS ASSOCIATION IN SUPPORT OF APPELLEE

Of Counsel:
NEIL I. ADELMAN
RICHARD D. EMERY

BRUCE J. ENNIS
(Counsel of Record)
KIT ADELMAN-PIERSON
MARK D. SCHNEIDER
JOHN T. NAKAHATA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
Telephone: (202) 223-4400
Attorneys for Amici

March 25, 1989

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---

BRIEF OF AMICI CURIAE JANE ROE, JOHN DOE, INC., AND THE CONSENTING ADULTS TELEPHONE RIGHTS ASSOCIATION IN SUPPORT OF APPELLEE

INTEREST OF AMICI [1]

Amici Jane Roe, John Doe, Inc., and Consenting Adults Telephone Rights Association ("CATRA") are the plaintiffs in *Roe v. Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988), in which the court granted a preliminary injunction against enforcement of the same "indecency" prohibition

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[1] Appellants and Appellee have both consented to the filing of this *amicus* brief. Their letters of consent are being lodged with the Clerk.

at issue in this appeal. *Amici* are all involved in the business of engaging in or facilitating live, private, two-way telephone conversations, often of a frankly sexual nature, with adults who request such conversations and pay for them in advance by credit card.[2] Such conversations range in length from ten to thirty minutes. Typically, about half the conversation is sexually oriented.[3]

Amici filed suit in New York at virtually the same time appellee Sable filed the instant litigation in California. Although engaged in a different business from Sable--live conversations rather than pre-recorded messages—*amici* were similarly threatened with prosecution and civil proceedings under 47 U.S.C. § 223(b), as amended. *Amici* obtained preliminary injunctive relief similar to that obtained by Sable.[4]

Although the Government acknowledges that the live service provided by *amici* is "unlike" the service provided by pre-recorded message companies, *see* Brief for the Cross-Appellants/Appellee FCC *et al.*, at 6, n.3 ("App. Br."), and although the Government has chosen, apparently for tactical reasons, to appeal only the Sable injunction and not the injunction obtained by *amici* in the

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[2] Jane Roe is a pseudonym for an adult resident of New York. John Doe, Inc., is a pseudonym for a New York corporation. CATRA is an association, all of whose members are engaged in the business described in text. CATRA sued in the district court and appears here on its own behalf and on behalf of its members.

[3] One objective of this business is to develop a personal relationship with the callers so that they will call back and request the other party to the conversation by name. Consequently, the conversations typically include non-sexual subject matter, such as the callers' personal lives, occupations, interests in sports or politics, etc.

[4] "We preliminarily enjoin enforcement of 47 U.S.C. § 223(b) as it pertains to 'indecent' speech and permanently enjoin enforcement of this statute if such enforcement proceeding is based on 'indecent' conversations occurring while the preliminary injunction is in effect. All relief requested relating to 'obscene' conversations is denied." *Roe v. Meese*, 689 F. Supp. at 348.

New York litigation, the questions presented in the Government's appeal (and in Sable's cross-appeal) encompass not only the pre-recorded messages at issue in the *Sable* litigation, but also live conversations pre-paid by credit card. Thus, a ruling by this Court could directly affect the relief *amici* have obtained in their case.

SUMMARY OF ARGUMENT

The Government argues that this Court should reverse the judgment of the District Court regarding "indecency" because the pre-recorded messages criminalized by section 223(b) are allegedly like the mid-afternoon radio broadcasts at issue in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). Live, private, two-way telephone conversations, however, are wholly unlike radio broadcasts. *Pacifica* affirmed the FCC's time-shifting regulation of "indecent" speech on the narrow ground that broadcast speech has traditionally been subject to regulation due to its unique character. In particular, the FCC had found that children inevitably would be in the broadcast audience during the daytime, so the only way to assure that many children did not hear a particular broadcast would be to require that the broadcast be presented in the evening. Few if any of the relevant special features of broadcasts apply to live, two-way, private telephone conversations between consenting adults criminalized by section 223(b). No minors, by definition, take part in such conversations. The First Amendment does not allow Congress to ban indecent but non-obscene constitutionally-protected conversations between consenting adults on the ground that a minor might conceivably take part in *another* conversation of a similar nature. Point I(A)(1).

Even if, *arguendo*, it were constitutional to criminalize private, two-way "indecent" conversations between consenting adults on the ground that minors might participate in different conversations of a similar nature, no such law would be constitutional absent a showing that minors

did *in fact* participate in such live indecent conversations. Indeed, it is concededly central to the Government's argument that the indecent speech criminalized by section 223(b) is "readly accessible to children." App. Br. at 19. *See, e.g., id.* at 27-28, 31, and 33. But on three separate occasions the FCC has ruled that minors have "virtually no access" to live telephone services such as those represented by *amici* that require pre-payment by credit card. Indeed, there is no evidence in the administrative, congressional, or judicial record (including the records in the instant case and *Roe v. Meese, supra*) that *any* minor has *ever* gained access to a live credit card service covered by the Act. For that and several other reasons, *Pacifica* is inapposite and § 223(b) is unconstitutional as applied to live, credit card services paid for in advance by credit card. Point I(A)(2).

Accordingly, even if a total ban of indecent *pre-recorded* messages would be constitutional, § 223(b)'s manifest and substantial overbreadth renders it void on its face. *E.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The Court should therefore affirm the "indecency" ruling rendered below. Point I(B).

If the Court nevertheless rejects *amici's* overbreadth argument, it should in any event recognize the substantial differences between live, private, two-way "indecent" telephone conversations, and pre-recorded telephone messages that can be heard by many people at the same time, and should explicitly reserve judgment on the constitutionality of the Act as it applies to live conversations prepaid by credit card. Point II.

ARGUMENT

I. CONTRARY TO THE GOVERNMENT'S CLAIM, SECTION 223(b)'S PROHIBITION OF "INDECENT" SPEECH CRIMINALIZES A SUBSTANTIAL AMOUNT OF SPEECH THAT IS CONSTITUTIONALLY PROTECTED FOR ADULTS AND IS VIRTUALLY INACCESSIBLE TO MINORS. BECAUSE THAT PROHIBITION IS PLAINLY OVERBROAD, THIS COURT SHOULD AFFIRM THE LOWER COURT'S "INDECENCY" RULING.

Amici believe that section 223(b) is unconstitutional in all of its applications, because the First Amendment prohibits the Government from criminalizing speech that is constitutionally protected for adults on the basis of a legislative "fact-finding" that such a complete prohibition is needed to "preclud[e] access by minors altogether." App. Br. at 33. We live in a society where children mingle freely with adults and have access to most of the avenues of communication used by adults. Regardless of the mode of communication at issue, therefore, the only way to *ensure* that access is denied to children "altogether" is to deny it to adults "altogether." If protected adult speech could be banned in order to preclude access by minors, then the adult population could be reduced "to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). It has been clear since *Butler*, however, that protected speech may not be so proscribed. Indeed, in the present context, until Congress amended the statute in 1988, the FCC had, in its own words, "consistently regarded a total ban on the dissemination of indecent, but not obscene, material to be beyond the bounds permitted by *Pacifica*."[5] The Depart-

[5] Testimony of the General Counsel of the FCC, *Telephone Decency Act of 1987: Hearing on H.R. 1786 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 246, 250 (1987).

ment of Justice has taken a similar position,[6] as has every court to have considered the question.[7]

Even if section 223(b) were not unconstitutional in *all* of its applications, however, it still is facially invalid. As *amici* demonstrate below, the provision is plainly unconstitutional as applied to live, private, two-way telephone conversations of the type provided by *amici*. In what follows *amici* demonstrate: (A)(1) the Government could not criminalize "indecent" private two-way conversations between adults even if it could demonstrate that minors might conceivably participate in different indecent conversations; (A)(2) in any event, there is *no* evidence that minors actually take part in such conversations, and considerable evidence to the contrary, and there can therefore be *no* rationale for extending the doctrine of *Pacifica* to validate criminalization of such conversation; and (B) as such the provision is substantially overbroad and so facially invalid.

A. The Government May Not Prohibit and Criminalize "Indecent" Live, Private, Two-Way Telephone Conversations Between Consenting Adults Paid For In Advance By Credit Card.

1. *The Government Could Not Criminalize "Indecent," Live, Private Two-Way Telephone Conversations Between Consenting Adults Even If It Could Demonstrate That Minors Participate In Similar Conversations.*

Assuming that "indecency" is defined equivalently to "obscene as to minors," Congress may criminalize "in-

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[6] Statement of the United States Attorney for the District of Utah, representing the Department of Justice. Hearings, *supra* n.5, at 258.

[7] *See Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560 (2nd Cir.), *cert. denied*, 109 S.Ct. 305 (1988); *Roe v. Meese*, 689 F. Supp. 344, 346-47 (S.D.N.Y. 1988); *Sable Communications, Inc. v. FCC*, 692 F. Supp. 1208, 1209 (C.D. Cal. 1988).

decent" speech between a minor and an adult, even though that same speech between two adults would be constitutionally protected. *Ginsberg v. New York*, 390 U.S. 629 (1968). And, as the Court made clear in its narrow holding in *Pacifica*, the FCC may impose limited time shifting regulations to minimize the number of minors who might gain access to broadcasts containing indecent language, even though the time shifting would force adults who wish to hear these broadcasts to hear them at a later time. Nothing in these cases, or in any other case, however, lends any support to the proposition that the Government may criminalize private indecent speech to which no minor has access as a way to ensure that no minor could ever take part in a completely different conversation.

This Court has consistently rejected the proposition that Government can prohibit speech protected as to adults in order to insure that no minor will ever gain access to it. In *Butler v. Michigan*, 352 U.S. 380 (1957), the Court squarely rejected the State's assertion that it could "quarantin[e] the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence." *Id.* at 383. The Court explained that this legislative approach was "not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children." *Id.* Similarly, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court struck down a statute that prohibited unsolicited mailing of contraceptive advertisements to adults and minors alike despite the Government's claim that without such an absolute ban some minors could gain access to those ads. The Court explained that "a restriction of this scope is more extensive than the Constitution permits. . . . The level of discourse reaching a mailbox simply cannot be limited to

that which would be suitable for a sandbox." *Id.* at 73-74 (citation omitted).

Recently, in *Wilkinson v. Jones*, 480 U.S. 926 (1987), the Court reviewed the Tenth Circuit's holding that a statute banning "indecent" cable television programming violated the First Amendment. Before the lower courts and on appeal to this Court, the State argued that outright prohibition of "indecent material" on cable television was necessary to protect children. Both the District Court and Court of Appeals rejected the State's contention and found that the statute unconstitutionally impaired the First Amendment rights of adults. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985); *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). This Court summarily affirmed the lower court's decision striking down the statute. *Wilkinson v. Jones*, 480 U.S. 926 (1987).[8]

Just last term, the Court confirmed that statutes affecting speech must be narrowly tailored, and explained that a statute is narrowly tailored *only* "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Shultz*, 108 S.Ct. 2495, 2502 (1988) (citing *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810 (1984)). The *Frisby* Court also confirmed that a "complete ban" on speech can be justified "only if *each activity* within the proscription's scope is an appropriately targeted evil." *Id.* (emphasis added).

Section 223(b) cannot survive scrutiny under *Frisby*, *Wilkinson*, *Bolger* and *Butler*. Here, Appellants do not

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[8] *Accord Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (affirming lower court's decision to enjoin enforcement of ordinance prohibiting cable distribution of any "obscene or indecent material"); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (holding statutory prohibition of "indecent" cable programming unconstitutional).

even argue that *adult* access to "indecent" speech is an evil that Congress could separately target and proscribe. Yet section 223(b) was deliberately amended to criminalize such adult access. Unlike the cablecasts in *Wilkinson*, the mass mailings in *Bolger*, and the books in *Butler*, there is no reason to believe any minor has gained access to a private telephone conversation accessed by an adult. The statute bars such adult conversations *not* to avoid exposure by children to the particular adult conversation deemed indecent, but as a purely prophylactic measure—to assure that no minor could ever participate in an entirely different telephone conversation. Accordingly, section 223(b)'s complete ban on "indecent" telephone speech is even *less* tailored to the evil at which it is directed than the laws struck down in the cases cited above. It plainly violates the First Amendment because it is not narrowly tailored to proscribe the only evil—access by minors—Appellants contend Congress could constitutionally proscribe.

The FCC's suggestion—rejected in Congressional testimony by its General Counsel in 1987[9]—that *Pacifica* sanctions such infringement of all adults' First Amendment rights should be dismissed out of hand. In *Pacifica*, the Court approved a regulation that restricted the time for broadcast of certain "indecent" programming because that minimized minors' access to the programming without preventing adults' access. But in so ruling the Court explicitly "emphasize[d] the narrowness of our holding." 438 U.S. at 750. The Court later reemphasized this point in *Bolger*, stating that the government's interest in regulating broadcasting does "not readily translate into a justification for regulating other means of communication." 463 U.S. at 74. In spite of these warnings, Appellants ignore or paper over the substantial differences between *Pacifica* and the issues presently before the

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[9] *See* n.5, *supra*.

Court, and request a dramatic expansion of that narrow holding. But the distinctions between the time-channeling regulation reviewed in *Pacifica* and a criminal prohibition of "indecent" speech by live telephone services are clear and substantial:

(1) *Pacifica's* approval of the FCC's time-channeling regulation was based explicitly and narrowly on the fact that broadcast speech has traditionally been subject to substantial regulation because of its unique characteristics. *See* 438 U.S. at 758-759 (Powell, J., concurring). Crucially, the FCC determined that the program at issue in *Pacifica* "w[as] broadcast at a time when children were undoubtedly in the audience." 56 F.C.C. 2nd, at 99, cited at 438 U.S. at 730. Because a broadcaster during the daytime "cannot reach willing adults without also reaching children," *id.* at 758-759 (Powell, J., concurring), the Court was willing to fashion a narrow exception to the principle established in *Butler v. Michigan*, 352 U.S. 380 (1957), that the legislature may not limit speech which adults are constitutionally entitled to hear in order to protect children.

These concerns unique to broadcast media are in no way present in private live two-way telephone conversations. A principle feature of private conversations between two adults is that the rest of the world, adults and minors alike, is excluded.[10] In such conversations it is *not* the case that the proscribed conversation may not be

[10] Although the Appellants argue that the "similarity" of telephone services to broadcasting is "underscored" because prerecorded messages can be provided to thousands of callers "simultaneously," App. Br. at 28, that claim is not true in the case of live telephone services paid for by credit card. Even with prerecorded services, the better analogy is to *cable* television, not broadcasting, because the messages are confined to cable transmission, not sent through the air. As noted, cable television may not be subjected to "indecency" regulation. And even as compared to cable television, of course, it is far less likely a child will overhear a telephone message or conversation than a television message.

held with an adult without children participating in the same conversation. The possibility that a different indecent conversation between an adult and a child could theoretically take place does not alter the protected nature of the adults' conversation. Nothing in *Pacifica* lends support to the blunderbuss constitutional rule proposed by Appellants, which would justify a ban on speech between two consenting adults on the ground that such a ban is the only way to insure "that some enterprising minors will never hear" an entirely different but also "indecent" message. App. Br. at 35. The FCC's test would, of course, overturn *Butler*, *Bolger* and *Wilkinson*, and go still further: on the theory that similar speech *could* be heard by children, or that the age of the participants could be (but was not) mistaken, it would justify criminalization of *any* indecent speech (or speech obscene only as to minors) even if the speaker could prove no minor in fact gained access.

(2) Section 223(b) imposes criminal penalties, including substantial fines and imprisonment. The regulation upheld in *Pacifica* involved only administrative action, and the Court expressly noted that it was *not* deciding whether the same speech could be subjected to criminal sanctions. 438 U.S. at 750.

(3) Section 223(b) imposes an outright ban on speech covered by the statute. The regulation in *Pacifica* was a mere time-channeling provision. Indeed, the FCC had emphasized that its regulation was "never intended to place an absolute prohibition on the broadcast" of the speech there at issue. 438 U.S. at 532-33. *See also id.* at 750; *id.* at 760 (Powell, J., concurring).

(4) The FCC's argument that this case is similar to *Pacifica* because "adults remain free to purchase recordings containing the identical messages at book or record stores," App. Br. at 34, is completely invalid in the context of live services. These interactive, personalized conversations, often with a specific individual requested by

the caller, cannot be purchased at a record or book store. In any event, the availability of similar speech in a different medium was not and should not be the touchstone of *Pacifica*. The Court's point there was that the *same* speech was available to adults through the *same* medium at a different time of day. Availability of motion pictures at video stores hardly renders motion picture theaters or cable television subject to "indecency" regulation. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232-233 (1987).

(5) Contrary to the Government's contention, it cannot reasonably be argued that this case is like *Pacifica* because the speech at issue is an "intruder" that invades the " 'privacy of the home' " and interferes with " 'the individual's right to be left alone.' " App. Br. at 28 (quoting *Pacifica*, 438 U.S. at 748). In *Pacifica*, the Court expressed concern that because "the broadcast audience is constantly tuning in and out" individuals might be confronted with "unexpected program content." 438 U.S. at 748. Obviously, live telephone services paid for in advance by credit card do not impinge upon the individual's "right to be left alone" in that or any other sense—calls are initiated by the caller, not the telephone service, and the conversations are individualized, not part of a stream of other programming.

(6) The *Pacifica* regulation was supported by FCC fact-findings, while section 223(b) is not: the FCC had expressly determined that the regulatory action at issue in *Pacifica* was a necessary and reasonable means to channel indecent speech " 'to times of day when children most likely would not be exposed to it.' " 438 U.S. at 733 (quoting the FCC). In contrast, the FCC has determined three times that minors can effectively be denied access to live telephone services by methods (*i.e.*, the credit card requirement) far less draconian than section 223(b)'s blanket prohibition.

(7) Finally, the substantial control parents exercise over access by their children to credit cards, *see Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Report and Order*, 49 Fed. Reg. 24998, 25001 (1984) (*"First Report and Order"*); *cf. Bolger*, 463 U.S. at 73 (parental control over incoming mail), contrasts sharply with the difficulty of parental control over minor's access to radio in the early afternoon, *Pacifica*, 438 U.S. at 732 (quoting the FCC).

In short, the mere possibility that minors could participate in live "indecent" telephone conversations cannot possibly justify a statute that criminalizes such constitutionally protected telephone conversations between consenting adults. Nothing in *Pacifica*, or in any other case, supports the application of section 223(b) to providers of live, private, two-way "indecent" telephone conversations with adults.

2. *"Indecent," Live, Telephone Conversations Between Consenting Adults Are Constitutionally Protected In Any Event Because There Is No Evidence That Any Children Participate In Similar Conversations.*

Even if Congress could criminalize live telephone conversations between consenting adults because it was determined that minors *would* gain access to different but similar speech—and it cannot—still, Congress may not so legislate here; there is absolutely *no evidence* that minors in fact participate in such live two-way conversations pre-paid by credit card. The FCC's effort to condemn *all* "dial-a-porn" on the ground that it is "readily accessible to minors," App. Br. at 31, ignores the critical differences between live services paid for by credit card and pre-recorded services, and fails to heed the government's own warning that "careful analysis of the particular medium at issue is necessary before the reasoning of *Pacifica* is extended outside the broadcasting medium." App. Br. at 27, n. 17.

When Congress originally passed section 223(b) in 1983, it directed the FCC to issue regulations providing defenses to prosecution when a telephone message service had taken steps that effectively prevented minors from having access to that service. In promulgating those regulations, the FCC consistently has recognized the important differences between live telephone services paid for by credit card holders, and pre-recorded messages services (which cannot practicably impose a credit card requirement).[11]

Contrary to the Government's suggestion, gaining access to live services is certainly not "as easy as turning on a radio or television set." App. Br. at 28. In fact, the regulatory and congressional record makes clear that minors have *virtually no access* to live, two-way services accessed only by use of a credit card.

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[11] In 1983 in those regulations the FCC determined that live services could comply with section 223(b) by requiring payment by credit card before permitting access to their services. Even before that decision, most live services imposed such a requirement. In the case of pre-recorded message services, however, the FCC has determined that such a requirement "would be impractical, as those services allow multiple calls to access a message simultaneously." First Report and Order at 24998.

More recently, however, the FCC has determined that new technology could serve a similar screening function for pre-recorded services, *see Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd. 2714, 2721-22 (1987), and the Second Circuit agreed. *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (1988). If this Court were otherwise to agree with appellants' present submission that ease of access to pre-recorded services would render the statute constitutional as applied to such services (a ruling that would depart substantially from this Court's prior decisions), and for some reason were to reject *amici's* overbreadth argument, then this Court in deference to the FCC should affirm the preliminary injunction in the instant case and remand for fact-finding on the efficacy of the new technology approved by the FCC in its *Third Report and Order*.

The FCC reached this conclusion on three separate occasions after careful investigation and "based upon [its] four-year effort to promote maximally effective, valid regulations." App. Br. at 32. In its *First Report and Order*, the FCC concluded that:

> imposition of a credit card restriction upon [live] "dial-a-porn" providers *will effectively ensure that minors are denied access to such services.* The age requirement for obtaining a credit card combined with the fact that minors who are issued credit cards are usually subject to parental supervision as to use of the card, should effectively prevent access by underage callers.

First Report and Order at 25001 (emphasis added.)[12]

In October 1985, after receiving numerous comments from interested persons and after "careful consideration of the record," the FCC again determined that requiring payment by credit card effectively restricts minors' access to live services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Second Report and Order*, 50 Fed. Reg. 42699, 42701, 42706 (1985) ("*Second Report and Order*"). The FCC explained:

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[12] The FCC's decision on this point was upheld by the United States Court of Appeals for the Second Circuit in *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 118-19 (2d Cir. 1984). In addition to requiring payment by credit card, live services take other steps to prevent access by minors. For example, it is common practice for live services to ask a caller if he has a telephone listed in his own name, and then verify that fact through directory service before authorizing service for the caller. If the caller does not have a listing in his own name, no service will be provided. Independent of such screening techniques, the cost of access to live services—which is approximately $35-$50, as opposed to a few dollars for services that provide pre-recorded messages—is likely to dissuade minors from using live services, particularly since this cost will later appear on a credit card bill sent to the home. Finally we doubt that many children's "natural curiosity about sex and adult behavior," App. Br. at 29, would lead them to initiate live sexually-explicit conversation with a stranger.

> In our [First] Report and Order we concluded that requiring prepayment by credit card effectively restricts minors' access to live "dial-a-porn" transmissions . . . . [N]ot finding any reason to reach a contrary conclusion in the augmented record, we find that this credit card provision is a suitable adjunct to the regulation we adopt today regarding recorded messages.

Id. at 42706. In its *Third Report and Order*, the FCC reached the same conclusion for the third time, finding that requiring pre-payment by credit card would ensure that minors would have "virtually no access" to live services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Third Report and Order*, 2 F.C.C. Rcd. 2714, 2724 n.14 (1987).[13]

Throughout the FCC's three investigations there was *no evidence*, or even *claim*, that *any* minors have gained access to live, credit card services. In its *Second Report and Order*, the FCC stated that "*no party submitting comments in this proceeding claims that the credit card restriction is ineffective to meet the mandate of Congress.*" *Second Report and Order*, 50 Fed. Reg. at 42706, n.56 (emphasis added).[14]

Similarly, throughout the congressional hearings and debates on section 223(b) as enacted, and on proposed

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[13] Indeed, the FCC believed that its statutory mandate permitted it to approve measures designed to screen out minors *only* if those measures would be "highly effective" and would ensure that minors would have "virtually no access" to adult telephone services: "As we interpret this statute, a ***high degree of effectiveness*** is contemplated so that if access is restricted to adults, as stated by the statute, minors will have ***virtually no access to adult message services.***" *Third Report and Order*, 2 F.C.C. Rcd. at 2724 n.14 (emphasis added).

[14] Nothing in the *Third Report and Order*, which reaffirmed the credit card requirement, suggests that any such evidence or claim was submitted during that investigation.

amendments, there was no evidence of even one minor gaining access to live, credit card services. To the contrary, the legislative activity surrounding section 223(b) overwhelmingly focused on concerns about minors' access to *pre-recorded* message services and *every* example of minors' access cited by the FCC or others involved a *pre-recorded* message.

Perhaps most telling of all, in this litigation and in the New York litigation filed by *amici* (which focuses specifically on live services), the Government has failed to offer even a single complaint that a minor gained access to a live, credit card service. Accordingly, in the context of live services, there is no basis whatsoever for the Government's contention that indecent speech is "readily accessible" by minors.

Appellants must therefore claim that access by minors, though "virtually" impossible, is not "totally" or "absolutely" impossible. App. Br. at 35.[15] But the fact that it is not "totally" impossible for minors to gain access to constitutionally protected "indecent" speech cannot justify a wholesale prohibition of that speech, even if such a prohibition were otherwise justified. If Government could constitutionally prohibit "indecent" speech unless it were absolutely certain that no minor could ever gain

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[15] Appellants' argument appears to be that even if a credit card requirement would be an "effective" way to prevent access by minors, as the FCC has repeatedly found, that requirement would not "totally" or "absolutely" preclude access by minors. In Appellants' view, total effectiveness is a "valid" legislative goal that justifies abridgment of adults' rights to have access to non-obscene speech: "And, given the nature of the telephone system, the lesser measures proposed by the FCC in its rulemaking proceedings, *effective as they were*, could not achieve the valid end of precluding access by minors *altogether*." App. Br. at 33 (emphasis added). *See id.* at 35 (stressing FCC statement that no requirement can guarantee "absolute impossibility of access," but ignoring preceding sentence making clear FCC believed credit card requirement guaranteed "virtually no access").

access to that speech, it could prohibit *all* "indecent" speech—or other speech deemed potentially harmful to minors—in *all* media. To preserve adult access to speech that is protected for adults, the First Amendment requires that we accept some risk that minors may occasionally gain access to it. We permit adults to watch "R" rated movies while recognizing that minors may occasionally sneak in to see those movies; we permit adults to rent videotapes for home viewing that are "indecent" or even obscene as to minors while recognizing that some adults may permit minors to view those movies, or that minors may gain access without permission; and we permit adults to purchase books and magazines with sexually explicit or otherwise "indecent" content even though some minors will inevitably gain access to those books and magazines. And all of those media are *more* accessible to minors than a private, two-way conversation for which a credit card is required. In sum, even if a complete ban on pre-recorded messages were necessary to prevent minors' access to them—a contention *amici* dispute—it is incontrovertible that the statute's outright ban on live, credit card services is *not* necessary, because minors have virtually no access to them.

B. Because Section 223(b) Purports To Criminalize "Indecent" Live, Two-Way Conversations Paid For By Credit Card, It Is Substantially Overbroad And Therefore Unconstitutional On Its Face.

For the foregoing reasons, even if the First Amendment permitted criminalization of pre-recorded messages that are not obscene (a proposition which is strongly at odds with this Court's decisions discussed above), the statute is facially unconstitutional. It is well established that statutes that "make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application," and that "[c]riminal statutes must be scrutinized with particular care." *City of Houston v. Hill*, 482 U.S. 451, 457

(1987). *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). *Cf. Frisby v. Schultz*, 108 S.Ct. at 2504 (White, J., concurring).

It is indisputable that live services engage in a very substantial amount of the speech criminalized by section 223(b)'s "indecency" prohibition. As explained above, throughout the FCC's "four year effort to promote maximally effective, valid regulations," App. Br. at 32, the FCC consistently recognized the substantial volume of calls handled by live services, and established the credit card defense for live services recognizing it was unavailable to pre-recorded services. *See* n.11, *supra*; *see, e.g., First Report and Order* at 24998. As amended, section 223(b) ignores these differences and explicitly criminalizes "direct[]" as well as recorded communications. 47 U.S.C. § 223(b)(1).

The statute is capable of application in a very substantial number of cases where its application would be unconstitutional—all live credit card conversations. The chill created by the overbroad application of the Act to live services is not at all speculative. *Amici*, plaintiffs in *Roe v. Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988), won a preliminary injunction enjoining application of the statute to them precisely because it impermissibly chilled their constitutionally-protected live services. Appellants' passing suggestion that the overbreadth of the statute is not substantial, App. Br. at 24, n.15, thus simply ignores the real and substantial chill of protected live, two-way conversations between adults that already has been judicially recognized. *See New York v. Ferber*, 458 U.S. 747, 772, n.27 (1982) (rationale of the "substantial overbreadth" principle "must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable") (citation omitted).

Appellants also argue, however, that two-way communication will not be chilled by the statute—and over-

breadth analysis should not be applied—because, "two way services are readily identifiable as distinct from prerecorded messages." App. Br. at 24 n.15. The suggestion that providers of live conversations are not deterred by a statute that expressly criminalizes their speech is remarkable indeed. To the contrary, the Act is far more susceptible to overbreadth challenge than many other statutes that have been found overbroad precisely because it *does* unambiguously punish a significant volume of clearly protected speech. It in no way diminishes the chilling effect that providers of live services know they are not providing prerecorded messages; the crucial point is that they also know that provision of live, two-way, indecent messages is unlawful.[16] Enforcement of the Act would result in a substantial chilling effect, deterring *amici* and other businesses from engaging in plainly constitutionally protected activity. It is to prevent just such a chilling effect that substantial overbreadth doctrine was created.

II. IF THE COURT DETERMINES THAT THE STATUTE IS NOT SUBSTANTIALLY OVERBROAD, IT SHOULD NEVERTHELESS MAKE CLEAR THE SUBSTANTIAL AND RELEVANT DIFFERENCES BETWEEN PRE-RECORDED MESSAGES AND LIVE, TWO-WAY PRIVATE TELEPHONE CONVERSATIONS PAID FOR IN ADVANCE BY CREDIT CARD

For the reasons set forth above and in appellee's brief, this Court should affirm the judgment of the district court as to "indecency" either because in all of its applications the statute is unconstitutional, or because, as ar-

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[16] The "chilling effect" of a law that clearly makes protected conduct unlawful is far greater than that of a law that chills by creating uncertainty whether protected conduct is criminalized. The *purpose* of overbreadth doctrine is to prevent the chilling of such protected speech—where it is substantial—even when the parties engaged in protected speech are not before the Court.

gued above, the statute is substantially overbroad insofar as it applies to constitutionally protected private live telephone conversations between adults. If, however, the Court were to agree with the Government's submission, it should nevertheless make clear that its decision does not address the constitutionality of the statute as applied to *amici* and others who provide live, two-way credit card telephone conversations.

Amici have obtained a preliminary injunction enjoining application of section 223(b) against them. *See Roe v. Meese*, 689 F. Supp. 344 (S.D.N.Y. 1988). The United States has chosen not to appeal that preliminary injunction. Before this Court, the United States has taken the position that the constitutionality of live, credit card services "is not at issue in the present case, as Sable's complaint here alleges only that Sable sells prerecorded messages." App. Br. at 6, n. 3. *Amici* have demonstrated above that the constitutionality of live, credit card services *is* at issue, since by proscribing such speech section 223(b) is substantially overbroad. Assuming, *arguendo*, that the Court does not adopt *amici's* substantial overbreadth argument, *amici* agree that the Court need not address the constitutionality of section 223(b) as it applies to live, credit card providers in order to resolve the present case. However, because both *Roe v. Meese* and the present case involve interpretation of the identical statute, and in light of the ongoing litigation in *Roe*, if this Court were somehow to rule that section 223(b) can constitutionally prohibit indecent pre-recorded messages, it should make clear that it is *not* ruling that the statute is constitutional as applied to live credit card providers such as *amici*.

CONCLUSION

For the foregoing reasons, the judgment of the District Court enjoining enforcement of section 223(b) insofar as it applies to indecent speech should be affirmed.

Respectfully submitted,

Of Counsel:

NEIL I. ADELMAN
RICHARD D. EMERY

BRUCE J. ENNIS
(Counsel of Record)
KIT ADELMAN-PIERSON
MARK D. SCHNEIDER
JOHN T. NAKAHATA
JENNER & BLOCK
21 Dupont Circle, N.W.
Washington, D.C. 20036
Telephone: (202) 223-4400
Attorneys for Amici

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Appellees.

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Cross-Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF ACTION FOR CHILDREN'S TELEVISION, AMERICAN CIVIL LIBERTIES UNION, CAPITAL CITIES/ABC, INC., CBS INC., INFINITY BROADCASTING CORPORATION, MOTION PICTURE ASSOCIATION OF AMERICA, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL PUBLIC RADIO, PEOPLE FOR THE AMERICAN WAY, PUBLIC BROADCASTING SERVICE, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, AND TRIBUNE BROADCASTING COMPANY AS AMICI CURIAE IN SUPPORT OF APPELLANT/CROSS-APPELLEE

[Counsel listed on inside cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:
SAM ANTAR
MARIAN E. LINDBERG
CAPITAL CITIES/ABC, INC.
1330 Avenue of the Americas
New York, New York 10019

Of Counsel:
HOWARD F. JAECKEL
CBS INC.
51 West 52 Street
New York, New York 10019

TIMOTHY B. DYK
Counsel of Record
TERESA D. BAER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amici and Capital Cities/ABC, Inc. and CBS Inc.

HENRY GELLER
DONNA LAMPERT
1776 K Street, N.W.
Suite 900
Washington, D.C. 20006
Counsel for Action for Children's Television

JOHN A. POWELL
C. EDWIN BAKER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
Counsel for American Civil Liberties Union

STEVEN A. LERMAN
DENNIS P. CORBETT
LAURA B. HUMPHRIES
LEVENTHAL, SENTER & LERMAN
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
Counsel for Infinity Broadcasting Corporation

FRITZ E. ATTAWAY
1600 I Street, N.W.
Washington, D.C. 20006
Counsel for Motion Picture Association of America, Inc.

[Additional Counsel Listed on Following Pages]

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
1771 N Street, N.W.
Washington, D.C. 20036
Counsel for National Association of Broadcasters

HOWARD MONDERER
MOLLY PAUKER
1331 Pennsylvania Ave., N.W.
Suite 700 South
Washington, D.C. 20004
Counsel for National Broadcasting Company, Inc.

LOIS J. SCHIFFER
KAREN CHRISTENSEN
2025 M Street, N.W.
Washington, D.C. 20036
Counsel for National Public Radio

Of Counsel:
SUSAN M. LISS
JAN G. LEVINE
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036

ANDREW JAY SCHWARTZMAN
MEDIA ACCESS PROJECT
2000 M Street, N.W.
Washington, D.C. 20036
Counsel for People for the American Way

PAULA A. JAMESON
NANCY H. HENDRY
1320 Braddock Place
Alexandria, Virginia 22314
Counsel for Public Broadcasting Service

J. LAURENT SCHARFF
JAMES M. SMITH
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
Counsel for Radio-Television News Directors Association

[Additional Counsel Listed on Following Page]

JANE E. KIRTLEY
800 18th Street, N.W.
Washington, D.C. 20006
Counsel for The Reporters Committee for Freedom of the Press

BRUCE W. SANFORD
R. B. QUINN
BAKER & HOSTETLER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Counsel for Society of Professional Journalists

Of Counsel:
DAVID D. HILLER
CHARLES J. SENNETT
TRIBUNE COMPANY
435 North Michigan Avenue
Chicago, Illinois 60611

ROBERT A. BEIZER
SCHNADER, HARRISON, SEGAL & LEWIS
1111 19th Street, N.W.
Washington, D.C. 20036
Counsel for Tribune Broadcasting Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

Nos. 88-515 and 88-525

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Appellees.

FEDERAL COMMUNICATIONS COMMISSION and
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES,
Cross-Appellants,

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Cross-Appellee.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF ACTION FOR CHILDREN'S TELEVISION, *ET AL.* AS AMICI CURIAE IN SUPPORT OF APPELLANT/CROSS-APPELLEE

INTEREST OF THE AMICI CURIAE [1]

The amici [2] are a group of commercial broadcasters, public broadcasters, cable interests, public interest

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[1] Written consent to the filing of this brief has been obtained from the parties to this case. The consent letters accompany this brief.

[2] The amici are listed on the cover of this brief. The lead amicus, Action for Children's Television, has participated in earlier Federal Communications Commission and court proceedings, seeking to im-

groups, and associations which represent broadcasters, journalists, program suppliers, listeners, and viewers.

Amici do not here challenge existing constitutional standards for regulating obscenity, which, the government urges, include "virtually all" of the material at issue here.[3] Nor do the amici offer so-called "dial-a-porn" services.

Amici address only the question of indecency regulation. The broadcast and cable amici offer news, public affairs, informational, artistic, and entertainment programming by conventional and cable television and radio. While the vast majority of such material would not be even arguably indecent under an appropriate standard, amici fear that some of this material may be deemed "indecent" under the broad standard recently adopted by the Federal Communications Commission (the "Commission").

Amici use various methods to aid parents in determining whether their children should have access to possibly indecent material. In broadcasting, this material generally is offered, if at all, in the evening hours when in most households parents are at home, so that they can supervise their children, and is preceded by warnings as to content.[4] In the cable medium, parents may decline to

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pose affirmative obligations on broadcasters to serve the child audience with educational and informational programming. Action for Children's Television opposes the statute here because it believes that parental responsibility and parental choice are critical in this area, and that government regulation should not reduce adults to the level of children in the name of protecting children.

[3] Brief for the Cross-Appellants/Appellees at 23 n.15 (hereinafter cited as "Gov't Br."). Accordingly, they take no position as to the validity of a national standard for judging obscenity, the issue raised in this case by Sable Communications of California, Inc. Amicus American Civil Liberties Union opposes any prohibitions on obscenity as a violation of the First Amendment; it does not view that issue as raised by the questions on which probable jurisdiction was noted.

[4] 18 U.S.C. § 1464 provides that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication

subscribe to a particular service; cable companies also offer lockboxes for cable services.[5] Amici oppose any regulation of non-obscene communications that significantly reduces the availability of protected communications to adults or that replaces parental supervision with a government determination of what is fit for children.

Amici are concerned that if a total ban on indecent speech in the telephone medium were sustained, that ban would be urged as a predicate for equally indiscriminate sweeping bans on indecent speech in broadcasting, cable television, and other media as well.[6] Efforts to prohibit indecent speech have not been limited to telephone communications; they have extended to broadcasting, cable, and print. For example, an almost identical federal statute was recently adopted imposing a blanket ban on broadcast indecency,[7] which many of the amici are chal-

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shall be fined not more than $10,000 or imprisoned not more than two years, or both." As interpreted by the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), that statute allows the Commission to require time channeling for indecency. *See id.* at 750; *id.* at 757 (Powell, J., concurring).

[5] 47 U.S.C. § 544(d)(2)(A) provides that, "[i]n order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber."

[6] This is not to suggest that the media are indistinguishable. There are a number of significant distinctions between this case and a prohibition on broadcast and cable indecency. Broadcasting and cable, unlike the telephone, are editorial media and offer a journalistic and artistic product rather than "telephone sex services," Gov't Br. at 28, which the government suggests uniformly appeal to the prurient interest, *id.* at 23 n.13. Also, this case involves the feasibility of a variety of blocking mechanisms in a medium where time channeling (as in broadcasting) and lockboxes (as in cable) appear to be an unsatisfactory method of assisting parental control. *See Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121 (2d Cir. 1984) (setting aside regulation involving time-channeling for telephone medium).

[7] The statute requires that the Commission "promulgate regulations in accordance with section 1464, title 18, United States Code,

lenging as unconstitutional.[8] Blanket bans on indecent speech in the cable and print media have also been consistently held unconstitutional.[9]

The Court's decision in this case could have far-reaching effects on protected speech in these other media. Indecency is defined by the Commission to include a range of material with substantial social value. It applies to broadcasts concerning highly sensitive issues, such

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to enforce the provisions of such section on a 24 hour per day basis." Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes, Pub. L. No. 100-459, § 608, 102 Stat. 2229 (1988). The Federal Communications Commission thereupon adopted, without notice or opportunity for public comment, a 24-hour-a-day ban on broadcast indecency. *Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464*, 4 FCC Rcd 457 (1988) (adding 47 C.F.R. § 73.3999).

[8] *Action for Children's Television v. FCC*, *petition for review filed*, No. 88-1916 (Dec. 30, 1988), *stay granted* (D.C. Cir. Jan. 23, 1989). Unlike most broadcast regulation, the Commission's regulation of broadcast indecency does not rest upon the spectrum scarcity rationale, which has been used to justify most content regulation of broadcasting. Under that rationale, "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Both this Court in the original *Pacifica* decision, *see* 438 U.S. at 770 n.4 (Brennan, J., dissenting), and the Commission, *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 936 n.11 (1987), declined to rely on the spectrum scarcity theory to support the regulation, much less the prohibition, of broadcast indecency. Instead, the Commission's regulation of broadcast indecency rests on a wholly different theory—that in the broadcast medium parental supervision should be assisted because the medium is "uniquely accessible to children. . . ." *Pacifica*, 438 U.S. at 749.

Currently, there is litigation pending which raises questions as to the continued validity of the spectrum scarcity rationale for broadcast regulation, *see, e.g.*, *Syracuse Peace Council v. FCC*, No. 87-1516, slip op. (D.C. Cir. Feb. 10, 1989), and many of these amici have profound differences among themselves concerning those questions, which the Court need not reach here.

[9] *See* cases cited in note 33 *infra*.

as live news programs dealing with angry political demonstrations, informational programs about serious health issues like AIDS, and the broadcast of other news and public affairs programming involving those persons who, for whatever reason—cultural impoverishment, social disaffection, or the evolution of community mores—regularly and publicly use language which some consider offensive. The Commission's standard also extends to presentations of serious drama, motion pictures, modern dance, dramatizations of serious works of literature, and satirical material.[10] Amici believe that they could not realistically portray American society in the programs which they offer if they were effectively barred from including material deemed to be indecent because it is offensive to some. Amici believe that the Constitution does not require that political, social, and artistic representations be sanitized so that they are always fit for children, and that the First Amendment protects the important role of the media in mirroring both what is desirable and what is offensive in modern America.[11]

Amici believe that any blanket ban on indecent speech within any medium would not only prevent the presentation of material with substantial social value but, because of the vagueness and overbreadth of the definition of indecency, would also have a substantial chilling effect on the dissemination of material that is not indecent. Amici believe that such a ban violates the First Amendment rights not only of the producers and distributors of such materials but also of the adult audiences that they serve.

SUMMARY OF ARGUMENT

Section 223(b) is unconstitutional because it totally bans protected speech. Under current law, obscenity is not protected, but this Court has repeatedly made clear that the First Amendment protects indecent, non-obscene speech. It is equally clear that government cannot impose

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[10] *See* page 28 *infra*.

[11] As this Court noted in *Cohen v. California*, 403 U.S. 15, 25 (1971), "one man's vulgarity is another's lyric."

a blanket ban on protected speech and thus "reduce the adult population" to seeing and hearing "only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Congress' determination that a total ban is necessary cannot prevent this Court from examining the strength and legitimacy of the asserted governmental interest.

In fact, this statute rests on an impermissible governmental objective. The government's sole legitimate interest in regulating indecent speech is, at most, to assist parents in supervising their children, not to supersede parental authority entirely. A variety of mechanisms are available to assist such parental supervision. Thus, in broadcasting, indecency may be regulated through channeling broadcasts to hours when most parents are able to supervise their children; in cable, parents must initially choose to subscribe to a particular service, and, if they choose to subscribe, may use lockboxes to screen material they believe their children should not watch; and in print, the sale of indecent materials to minors may be barred because that bar does not block adult access to the material. In the telephone medium, blocking devices, scrambling, and access codes promote the same goal of parental choice. However, the government cannot go so far as to ban adult access entirely, as prior cases have uniformly held.

The indecency standard incorporated by the statute is also unconstitutionally vague and overbroad. The Commission has ruled that it will apply in the telephone context the same generic definition of indecency that it now applies in broadcasting. In contrast to the prevailing rule with respect to obscenity, the serious literary, artistic, political, and scientific value of the speech does not bar a finding that it is indecent. Nor is it necessary that the material appeal to the prurient interest. The Commission has declined to provide any meaningful illumination of this standard, but has left electronic publishers to interpret it at their peril. The vagueness and overbreadth of this standard chills speech that is fully pro-

tected by the First Amendment, including news, public affairs, information, drama, satire, and artistic expression of great value to the adult audience.

ARGUMENT

INTRODUCTION

Before the blanket ban on telephone indecency (the "Bliley-Helms Amendment")[12] was enacted, the Commission sought to regulate indecency in the telephone medium through the use of access codes, scrambling, blocking devices, and other mechanisms that facilitate parental choice.[13] Despite the existence of these mechanisms, Congress in April 1988 imposed a blanket ban on the dissemination of telephone indecency, and thereafter took the same action for the broadcast medium.[14] These amici urge that the blanket ban on telephone indecency, like any other blanket ban on indecent speech, is unconstitutional both because it totally bans protected speech and because the definition of indecency is unconstitutionally overbroad and vague.[15]

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[12] Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 423 (1988).

[13] The permissibility and adequacy of these various regulations have been extensively litigated. *See Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.) (upholding regulations involving access codes, scrambling, and credit card payments insofar as they concerned obscenity), *cert. denied*, 109 S. Ct. 305 (1988); *Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986) (setting aside regulation involving access codes with respect to the New York Telephone Company system because there was no evidence that access codes were technically feasible on that system and were the least restrictive means to limit minors' access); *Carlin Communications, Inc. v. FCC*, 749 F.2d 113 (2d Cir. 1984) (setting aside regulation involving time channeling and credit card payments).

[14] *See* note 7 *supra*.

[15] This brief does not address the question whether *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), was correctly decided. In this connection, we note that the Second Circuit has held that no regulation of indecency is permissible in the telephone medium,

I. INDECENT SPEECH IS PROTECTED BY THE FIRST AMENDMENT.

Although the government does not say so explicitly, the premise of its argument supporting the ban on indecent telephone speech is that the First Amendment does not protect indecency.[16] In this respect, the government's argument is fatally flawed. Under current law, the First Amendment does not protect obscene speech.[17] But it has long been clear that 'indecent," non-obscene speech is protected.

This Court has repeatedly recognized that the protections of the First Amendment extend to indecency. For example, in *Bantam Books, Inc. v. Sullivan*, the Court held unconstitutional a state law regulating indecent and other speech "manifestly tending to [contribute] to the corruption of the youth" because the law "provide[d] no safeguards whatever against the suppression of non-obscene, and therefore *constitutionally protected*, matter." [18] In *Cohen v. California*, this Court invalidated a conviction imposed for wearing a jacket bearing a four-letter word in a courthouse corridor because the speech was protected and could not be suppressed.[19] More recently, in *Bolger v. Youngs Drug Products Corp.*, the Court invalidated a ban on mailing advertisements for contraceptives, holding that the material was protected and that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable

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even that designed to aid parental supervision. *Carlin Communications, Inc.*, 837 F.2d at 558-60. This question need not be reached here to invalidate the present legislation.

[16] *See* Gov't Br. at 25. That position is taken explicitly by a number of the amici supporting the government. *See* Brief of Morality In Media, Inc. as Amicus Curiae at 10-16; Brief Amici Curiae of Citizens for Decency Through Law, Inc., *et al.* at 7-17.

[17] *Miller v. California*, 413 U.S. 15, 23 (1973).

[18] 372 U.S. 58, 70 (1963) (emphasis supplied).

[19] 403 U.S. 15 (1971).

for a sandbox." [20] Only last term in *Hustler Magazine v. Falwell*, the Court unanimously held that an offensive political cartoon using sexual innuendo was protected by the First Amendment.[21]

In *FCC v. Pacifica Foundation*,[22] upon which the government places primary reliance,[23] this Court, while sustaining channeling, also held that the First Amendment protects indecent broadcasts. In his dissent, Justice Brennan commented on the Court's "unanimous agreement that the Carlin monologue is protected speech." [24] In his plurality opinion, Justice Stevens noted that indecent speech, while subject to channeling in the broadcast medium, is "not entirely outside the protection of the First Amendment." [25] And in his concurrence, Justice Powell explicitly stated his view that the First Amendment protects indecent speech. He noted that, except in the context of commercial speech, the Court is not "free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." [26]

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[20] 463 U.S. 60, 74 (1983).

[21] 108 S. Ct. 876 (1988). As this Court has noted:

> The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern.

Roth v. United States, 354 U.S. 476, 487 (1957) (footnote omitted); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam).

[22] 438 U.S. 726 (1978).

[23] *See* Gov't Br. at 25.

[24] *Pacifica*, 438 U.S. at 763 (Brennan, J., dissenting).

[25] *Id.* at 746 (plurality opinion).

[26] *Id.* at 761 & n.3 (Powell, J., concurring).

The courts of appeals and the Commission, like the district court here, have repeatedly reaffirmed that holding. In *Action for Children's Television v. FCC* ("*ACT*"), the District of Columbia Circuit concluded that "[b]roadcast material that is indecent but not obscene is protected by the first amendment. . . ."[27] The Eleventh Circuit in the cable television area[28] and the Second Circuit in the telephone context[29] have also explicitly held that indecent speech is protected. The Commission has conceded that indecent speech is protected by the First Amendment, both in litigation[30] and in congressional testimony which recognized that "this type of speech . . . is entitled to First Amendment protection."[31]

II. A BLANKET BAN ON INDECENT SPEECH IS UNCONSTITUTIONAL.

Just as it is clear that indecent speech is constitutionally protected, for more than a quarter of a century it has been established that government cannot impose a blanket ban on such speech and thus "reduce the adult

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[27] 852 F.2d 1332, 1344 (D.C. Cir. 1988).

[28] *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *see also Wilkinson v. Jones*, 430 U.S. 986 (1987) (mem.), *aff'g*, 800 F.2d 980 (10th Cir.) (per curiam), *aff'g sub nom. Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1106-17 (D. Utah 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

[29] *Carlin Communications, Inc.*, 837 F.2d at 552-60.

[30] *See, e.g.*, FCC's Opposition to "Motion for Stay and for Expedited Consideration," *Action for Children's Television v. FCC*, No. 88-1918, at 9 (D.C. Cir. filed Jan. 11, 1989).

[31] *Telephone Decency Act of 1987: Hearings on H.R. 1700 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 211 (1987) (testimony of FCC General Counsel) ("*1987 Hearings*"); *see also Harriscope of Chicago, Inc.*, 65 Rad. Reg. 2d (P&F) 1512, 1518 (1989).

population" to seeing or hearing "only what is fit for children."[23] Every single decision of which we are aware in broadcasting, cable, telephone, and print has concluded that blanket bans on indecency violate the First Amendment.[24] Under the Constitution, censorship is an impermissible response to speech that is deemed offensive.

The government has cited no case to the contrary, but argues for a change in this Court's jurisprudence on the grounds that "substantial deference" is due to Congress' determination that a ban is necessary,[25] and that the statute should be sustained "based on the determinations that Congress made in enacting it."[26]

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[23] *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957); *accord Bolger*, 463 U.S. at 73-74; *see also Hustler Magazine* v. *Falwell*, 108 S. Ct. 876 (1988); *Cohen* v. *California*, 403 U.S. 15 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963).

[24] *See, e.g., Wilkinson* v. *Jones*, 430 U.S. 926 (1987) (mem.), *aff'g*, 800 F.2d 980 (10th Cir. 1986) (per curiam), *aff'g sub nom. Community Television of Utah, Inc.* v. *Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) (cable); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (mail); *Butler* v. *Michigan*, 352 U.S. 380 (1957) (print); *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1343 n.13 (D.C. Cir. 1988) ("*ACT*") (broadcasting); *Carlin Communications, Inc.* v. *FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 109 S. Ct. 305 (1988) (telephone); *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985) (cable); *American Booksellers Ass'n* v. *Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986) (print); *Bushin* v. *Town of Ashburnham*, 622 F. Supp. 900 (D. Mass. 1985) (print); *Community Television of Utah, Inc.* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (cable); *American Booksellers Ass'n* v. *McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (print); *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (cable); *Tattered Cover, Inc.* v. *Tooley*, 696 P.2d 780 (Colo. 1985) (en banc) (print).

[25] Gov't Br. at 25.

[26] *Id.* at 23-23 n.14.

The cases cited by the government do not support its argument.[36] Ever since *Marbury v. Madison*,[37] this Court has made clear that the courts must independently interpret the Constitution. Nor is a congressional determination as to the need for legislation to be given weight where the government seeks to suppress speech under the First Amendment. This rule dates back to Justice Brandeis' concurrence in *Whitney v. California*.[38] Addressing a statute barring the advocacy of criminal syndicalism, Justice Brandeis stated that:

> This legislative declaration . . . does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was

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[36] The government's cases are not remotely on point. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330-31 n.12 (1985) (upholding statutory limitation on attorneys' fees in benefit cases before the Veterans' Administration, and noting that in reaching that conclusion the Court "need not rely on" Congress' findings on the question); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (sustaining statute excluding women from registering for the draft as not a violation of due process, relying on congressional findings because of "Congress' authority over national defense and military affairs").

Ginsberg v. New York, 390 U.S. 629 (1968), does not hold that deference to legislative judgments is appropriate in First Amendment cases. That case held only that, because "obscenity is not protected expression," sustaining the statute at issue there "require[d] only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id.* at 641.

[37] 5 U.S. (1 Cranch) 137 (1803).

[38] 274 U.S. 357 (1927) (Brandeis, J., joined by Holmes, J., concurring).

> one so substantial as to justify the stringent restriction interposed by the legislature.[39]

The Supreme Court has reaffirmed the rule in more recent cases. In *Landmark Communications, Inc. v. Virginia*, the Court stated that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake," [40] and explained that "[w]ere it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." [41]

In any event, Congress has made no finding in enacting the blanket ban on telephone indecency that such a ban is necessary to achieve a constitutional objective. The primary focus of the legislative history of the Bliley-Helms Amendment insofar as it concerns indecency was the desire to prevent all children from hearing material deemed to be "indecent." [42] That is not a legitimate governmental objective.

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[39] *Id.* at 378-79 (Brandeis, J., joined by Holmes, J., concurring).

[40] 435 U.S. 829, 843 (1978).

[41] *Id.* at 844; *see also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) ("Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force."); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 505 (1984) (in First Amendment cases, the Court "has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited"). In the broadcast medium, courts pay close attention to what Congress has done, but are not required to defer to congressional judgments. *See, e.g., Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102-03 (1973).

[42] *See, e.g.*, 134 Cong. Rec. H1690-91 (daily ed. Apr. 19, 1988) (remarks of Rep. Bliley); 133 Cong. Rec. S16,794-96 (daily ed. Dec. 1, 1987) (remarks of Sen. Helms).

In the area of indecency, the only arguably legitimate governmental purpose is to aid parents in supervising their children. This Court has noted that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." [43] In the broadcast medium, that purpose is achieved by the channeling of indecent speech to protect "*unsupervised* children." [44] The government's role is thus limited to "facilitat[ing] parental supervision of children's listening." [45]

In cable too, the sole government interest lies at most in assisting parents in supervising their children. The cases have emphasized the parental manageability of cable television, explaining that:

> [P]arents must decide whether to allow Cablevision into the home. Parents decide whether to select supplementary programming services. . . . Those services publish programming guides which identify programs containing "vulgarity," "nudity," and "violence." Additionally, parents may obtain a "lockbox" or "parental key" device enabling parents to prevent children from gaining access to "objectionable" channels of programming.[46]

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[43] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see also Bolger*, 463 U.S. at 73-75.

[44] *Pacifica*, 438 U.S. at 757 (Powell, J., concurring) (emphasis supplied). While this Court in *Pacifica* relied in part on the argument that adults should also be protected from indecent material, 438 U.S. at 748-49, the Court has since disavowed this rationale, *see Bolger*, 463 U.S. at 71-72. In *Pacifica*, Justice Powell relied heavily on Judge Leventhal's thoughtful dissenting opinion in the court of appeals, 438 U.S. at 757 n.1 (Powell, J. concurring), which likewise turned on the assumption that channeling is appropriate to enable adult supervision, *Pacifica Found. v. FCC*, 556 F.2d 9, 32-36 (D.C. Cir. 1977) (Leventhal, J., dissenting). Judge Leventhal concluded that the Commission could "assist parents in their protection of young children." *Id.* at 37 (Leventhal, J., dissenting).

[45] *ACT*, 852 F.2d at 1343.

[46] *Cruz*, 755 F.2d at 1420; *see also Community Television of Utah, Inc.*, 555 F. Supp. at 1172 (noting "the responsibility of a parent to oversee the development of his child").

In cable, courts have also made clear that "parents [must be allowed] to provide materials for their children that the children themselves cannot purchase . . . ." [47]

So too, in reviewing statutes regulating the display of books and magazines, this Court has consistently reaffirmed the role of parental choice. In *Ginsberg v. New York*,[48] the opinion made clear that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." [49] Explaining that laws prohibiting the distribution to minors of material that is obscene as to them "aid discharge" of parents' "primary responsibility for children's well-being," [50] the Court went on to note approvingly that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." [51]

The authorities have consistently rejected a blanket ban as neither necessary nor appropriate to aid parental supervision.[52] The government has not shown why the fundamental role of parents in making choices for their children, and in deciding how to raise their children, is suddenly rendered irrelevant when the medium is the telephone instead of broadcasting, cable, or print.

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[47] *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1115 (D. Utah 1985), *aff'd sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'd*, 480 U.S. 926 (1987) (mem.).

[48] 390 U.S. 629 (1968).

[49] *Id.* at 639.

[50] *Id.*

[51] *Id.* We note that parental choice is also facilitated in movie theaters through the movie ratings system.

[52] *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), does not support a contrary view, since the holding in that case rests on the need for school officials to prevent disruption of the school's educational mission by indecent speech.

In seeking to justify the blanket ban, the government suggests that Congress did act to support the role of parental choice, and relies on a supposed congressional determination that a total ban was necessary for that purpose.[53] As we have already noted, such a congressional finding would be entitled to no weight in the First Amendment area,[54] and in fact no such finding was made here. There appears to be only a single sentence in the legislative history addressing the question whether parental supervision is sufficient. It appears in a legal memorandum submitted by Citizens for Decency Through Law which urged that it was a "virtual impossibility for parents to monitor [telephone] use." [55] The government nonetheless attempts to suggest that there was a congressional finding that "neither access codes nor scrambling nor any other device so far developed can enable parents to prevent children's access." [56] The government thus seeks to craft an elaborate and wholly speculative rationale for totally banning indecent material to support parental choice.

There are a range of approaches to aiding parental choice. The government is at a loss to explain why blocking devices, scrambling, and access codes,[57] like channel-

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[53] Gov't Br. at 29-30.

[54] *See* pages 12-13 *supra*.

[55] 134 Cong. Rec. S4381 (daily ed. Apr. 20, 1988) (legal memorandum of Citizens for Decency Through Law) (footnote omitted). The record also contains statements that children had secured access. *See, e.g.*, 133 Cong. Rec. S16,794-95 (daily ed. Dec. 1, 1987) (remarks of Sen. Helms). There is no suggestion that they did so in circumstances where blocking, access codes, or scrambling had been used to prevent it.

[56] Gov't Br. at 30.

[57] The Commission has specifically ruled that scrambling is an "effective alternative method" of restricting minors' access to telephone services. *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 2714, 2720, *stay denied*, 2 FCC Rcd 3672 (1987), *aff'd sub nom. Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 109 S. Ct. 305 (1988). The Commission also approved

ling in broadcasting, subscriptions and lockboxes in cable, and prohibitions on the sale of printed materials to minors, do not allow parents to prevent their children from having access to indecent telephone messages at home if the parents choose to do so.[58]

However, the government urges that some "'enterprising minors'"[59] could evade their parents' determination to deny access to indecent telephone services by visiting a home at which parents had made a contrary determination.[60] But this argument is equally applicable to every other medium of communications. A child whose parents had determined not to buy a particular publication, not to subscribe to (or to lock out) a particular cable service, or not to permit the viewing of a particular television or radio program could visit a home where the parents had made a contrary decision. Thus, the government's argument here amounts to nothing less than an argument that speech characterized as "indecent" can be denied entirely to the adult audience in *every* medium of communications because of the possibility that some limited number of children, contrary to their parents' wishes and directions, could secure access to it. This theory wholly loses sight of the importance of preserving adult access to protected material.

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requiring message providers to implement an access code system, under which codes would be assigned only after an individual has submitted a written application containing proof that he is an adult. *Id.* at 2715, 2720. The Commission earlier approved prepayment by credit card as well. *Id.* at 2715. This case does not present issues as to the permissibility or feasibility of requiring particular mechanisms.

[58] Gov't Br. at 30.

[59] *Id.* at 10, 35 (quoting *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 50 Fed. Reg. 42,699, 42,706 n.54 (1985), *rev'd, Carlin Communications, Inc. v. FCC*, 787 F.2d 846 (2d Cir. 1986)).

[60] If blocking mechanisms are in place, such material would not be available from pay telephones.

As we have indicated,[61] the courts have consistently rejected this position and invalidated blanket bans, and this Court has done so explicitly in the *Bolger*[62] and *Butler*[63] cases. While the government is correct that *Pacifica* did not directly decide the specific question of whether a "safe harbor" was constitutionally required,[64] *Pacifica* approved only the Commission's notion of channeling broadcast speech.[65] The necessary implication of the Court's conclusion that indecency is protected speech is that a blanket ban is unconstitutional. Similarly, in those limited areas where other regulation of indecent speech has been permitted, this Court has approved it only where it did not have the "effect of suppressing, or greatly restricting access to, lawful speech" within the particular medium.[66]

Until now, this has been the view of those charged with enforcing the statute as well. In stark contrast to their present position, both the Commission and the Department of Justice in the past repeatedly emphasized that a blanket ban on indecent speech would be unconstitutional. In rejecting a proposal for an absolute ban on broadcast indecency, the Commission stated:

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[61] *See* page 11 *supra*.

[62] *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *see also Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970) (upholding statute under which a person offended by advertisements sent through the mail can require that the mailer cease mailing such advertising so as not to "risk that offensive material come into the hands of his children").

[63] *Butler v. Michigan*, 352 U.S. 380 (1957).

[64] *Pacifica*, 438 U.S. at 750 n.28.

[65] *Id.* at 750; *id.* at 757 (Powell, J., concurring).

[66] *Young v. American Mini Theatres Inc.*, 427 U.S. 50, 71 n.35 (1976) (plurality opinion); *see also Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 74 (1981).

> The unqualified reading of Section 1464 pressed by [Morality In Media], under which the broadcast of indecent material would be prohibited altogether would, we believe, run afoul of this constitutional premise.[67]

Testifying in 1987, the FCC's General Counsel emphasized that "legal precedent suggests that government regulation in this area cannot go so far as to altogether ban its dissemination to consenting adults." [68] Thereafter, in response to written questions from Congressman Thomas J. Bliley, Jr., the sponsor of the legislation, she noted that "in both broadcasting and dial-a-porn services, the Commission has consistently regarded a total ban on the dissemination of indecent, but not obscene, material to be beyond the bounds permitted by *Pacifica*." [69] So too, the spokesman for the Department of Justice testified that he was "of the opinion that an outright ban of indecent dial-a-porn messages would likely be found unconstitutional by the courts." [70] President Reagan, in a signing statement accompanying the legislation, also noted that "current Supreme Court jurisprudence is unfriendly to parts of this bill." [71]

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[67] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 931 (1987) (footnotes omitted) (emphasis supplied), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[68] *1987 Hearings* at 212 (testimony of FCC General Counsel); *see also Cable-Porn and Dial-a-Porn Control Act: Hearing on S. 1090 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 16 (1985).

[69] *1987 Hearings* at 246 (letter from FCC General Counsel); *see also id.* at 255 ("any attempts to prohibit consenting adults from receiving indecent but not obscene speech would be unconstitutional) (letter from FCC General Counsel).

[70] *Id.* at 258 (letter from U.S. Attorney Brent D. Ward).

[71] Remarks on Signing the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, 24 *Weekly Comp. Pres. Doc.* 541 (Apr. 28, 1988).

It is no answer to suggest, as the government tries to do in its brief, that because "[a]dults remain free to purchase recordings containing the identical messages at book or record stores," [72] they are not denied access to this material. If a blanket ban is constitutional in one medium, the government would no doubt argue that it would be valid in other media as well. In any event, the Court made clear long ago that free speech may not be "abridged on the plea that it may be exercised in some other place." [73] Nor is it an answer to suggest that adult access is not denied because messages conveyed through the use of indecent speech can instead be conveyed through the use of less offensive speech.[74] This Court made clear in *Cohen v. California* that many messages cannot in fact be conveyed in different words or forms because "words are often chosen as much for their emotive as their cognitive force." [75] It concluded that "[w]e cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." [76]

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[72] Gov't Br. at 34.

[73] *Schneider v. State*, 308 U.S. 147, 163 (1939); *see also Bolger*, 463 U.S. at 69-70 n.18; *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980). Although the Court in *Pacifica* noted that "[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs to hear these words," 438 U.S. at 750 n.28, the Court was obviously referring to the broadcast of prerecorded material. Large quantities of material that may be deemed to be indecent but that may not be prerecorded —such as original programming and news—are available only through the free medium of broadcasting. That people may be able to purchase different "offensive" material elsewhere is therefore constitutionally irrelevant.

[74] Gov't Br. at 25 n.16 (quoting *Pacifica*, 438 U.S. at 743 n.18 (plurality opinion)).

[75] 403 U.S. 15, 26 (1971).

[76] *Id.*; *see also San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 107 S. Ct. 2971, 2978 (1987). In Justice

In short, indecent speech cannot be treated as though it were the equivalent of obscenity and banned entirely.

III. THE TERM "INDECENT" IN SECTION 223(b) IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

If this Court were to invalidate the blanket ban on indecent telephone communications, it would not need to reach the questions concerning the Commission's underlying indecency enforcement standard. If this Court does reach that issue, we urge that the Commission's indecency enforcement standard is unconstitutionally vague and overbroad.

The Supreme Court has repeatedly held that laws seeking to regulate speech on the basis of its content must be clear and precise so that those subject to regulation are given adequate notice, and so that the regulation does not cause speakers to " 'steer far wider of the unlawful zone.' " [77] "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." [78] Precision is especially important where, as here, criminal sanctions may be imposed for violation of the statute.[79]

Stevens' plurality opinion in *Pacifica*, he stated "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." 438 U.S. at 743 n.18 (plurality opinion). This would appear to be directly contrary to the Court's holding in *Cohen*. In any event, the current indecency ban goes much further than a ban on the repetitive use of the "seven dirty words."

[77] *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

[78] *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

[79] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974); *Papachristou v. City of Jack-*

So far as we are aware, none of the federal statutes prohibiting indecent speech has ever contained any definition of indecency,[80] and there is no commonly accepted definition of that term. Federal court decisions before *Pacifica* struggled with the interpretation of the term "indecent," but none of them articulated a separate definition of indecency.[81] Indeed, before *Pacifica* the Commission agreed that " 'indecency' in 18 U.S.C. § 1464 had never been construed authoritatively by the federal courts. . . ." [82]

Like Congress and the courts, the Commission has had substantial difficulty defining indecency. Before 1975, in applying Section 1464, the Commission articulated a definition of indecency as material that "is patently offensive by contemporary community standards and utterly without redeeming social value," [83] a definition quite similar to the definition of obscenity except that appeal to the prurient interest was not required. In the 1975 *Pacifica* case, the Commission articulated a new, and seemingly broader, definition of indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast

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sonville, 405 U.S. 156, 162 (1972). We note that the Court in *Pacifica* expressly declined to "consider any question relating to the possible application of § 1464 as a criminal statute." 438 U.S. at 739 n.13; *see also id.* at 747 n.25 (plurality opinion); *id.* at 750.

[80] *See, e.g.*, 18 U.S.C. § 1464; 47 U.S.C. § 223(b). The term "indecent" in other federal statutes has been construed to be the same as "obscene." *See Hamling v. United States*, 418 U.S. 87, 110-16 (1974); *United States v. 12 200-ft. Reels of Super 8mm Film*, 413 U.S. 123, 130 n.7 (1973); *Roth v. United States*, 354 U.S. 476, 491 (1957).

[81] *See, e.g., United States v. Simpson*, 561 F.2d 23 (7th Cir. 1977); *Tallman v. United States*, 465 F.2d 282 (7th Cir. 1972); *Gagliardo v. United States*, 366 F.2d 720, 725-26 (9th Cir. 1966).

[82] Brief for Petitioner at 22, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *see Citizens Complaint Against Pacifica Found.*, 56 F.C.C.2d 94, 97 (1975).

[83] *Eastern Educ. Radio (WUHY-FM)*, 24 F.C.C.2d 408, 413 (1970).

medium, sexual or excretory activities and organs. . . ." [84] The existence of "social value" was no longer sufficient to render the material not indecent. On review, the court of appeals found that definition to be unconstitutionally vague and overbroad.[85]

The Supreme Court did not reach this question or approve the broad standard articulated by the Commission, but only its application to the particular broadcast —a George Carlin monologue involving repeated use of the "seven dirty words." [86] Justice Stevens noted for the majority that the " 'Court . . . reviews judgments, not statements in opinions.' " [87] He went on to explain that in the Commission's opinion "questions concerning possible action in other contexts were expressly reserved for the future," [88] and he declined to consider the broader question of the constitutionality of the standard.[89] In his plurality opinion, he stated that the Court's "review is limited to the question whether the Commission has the authority to proscribe this particular broadcast." [90] And Justice Powell agreed in a separate concurring opinion that the Court has appropriately refused to consider the overbreadth challenge because "the Commission's order was limited to the facts of this case." [91] In the Commis-

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[84] *Pacifica*, 56 F.C.C.2d at 98.

[85] *Pacifica*, 556 F.2d 9 (D.C. Cir. 1977).

[86] *Pacifica*, 438 U.S. at 742-43 (plurality opinion).

[87] *Id.* at 734 (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

[88] *Id.*

[89] *Id.* at 742-43 (plurality opinion). The Commission urged that the Court need not pass on the constitutionality of its generic definition because the Commission had addressed only the limited question of whether the particular broadcast was indecent and had not passed on the question of whether other material cited by the broadcasters in the case would be considered to be indecent. *See* Brief for Petitioner at 41-48, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

[90] *Pacifica*, 438 U.S. at 742 (plurality opinion).

[91] *Id.* at 761 n.4 (Powell, J., concurring); *see also id.* at 755-56 (Powell, J., concurring).

sion rulings that followed over the next decade, the agency adopted a narrow construction of its 1975 standard, limiting it to material similar to the Carlin monologue.[92]

In sharp contrast to this limited approach, the Commission in 1987 determined to regulate indecency more broadly.[93] While purporting to adhere to the "patently offensive" definition articulated in the Commission's 1975 *Pacifica* decision, it effectively articulated a new standard, and made clear that it will no longer confine indecency to the repetitive use of the "seven dirty words." The Commission also warned broadcasters generally that they must interpret and apply its broad new standard or face the possibility of sanctions, including the denial of license renewal.[94]

The Commission has made clear that it intends to apply this generic definition to telephone indecency as well. On June 1, 1987, barely one month after articulating the definition in the broadcasting area, the FCC's General Counsel reiterated that the Commission would apply the broadcast standard in the telephone context. She stated that while the "definition of indecency was developed in the broadcast context," [95] the Commission

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[92] *See, e.g., Pacifica Found.*, 95 F.C.C.2d 750 (1983) (finding morning announcer's use of several of "seven dirty words" not to be indecent; *WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978) (finding not to be indecent television broadcasts dealing with "scatology, immodesty, vulgarity, nudity, profanity, and sacrilege"); *see also Decency in Broadcasting, Inc.*, 94 F.C.C.2d 1162 (1983).

[93] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930 (1987).

[94] The failure to comply with Commission requirements always presents the risk of loss of license and a ban on all further publication, a penalty which cannot be imposed on any other publisher.

[95] *1987 Hearings* at 211 (testimony of FCC General Counsel); *see also Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 3672, 3673-74 (1987) (indicating that broadcast definition would be applied).

has "been using this definition in determining which dial-it messages appear to be indecent under current Section 223." [96]

Congress in enacting the Bliley-Helms Amendment also apparently contemplated use of this expanded indecency standard. Senator Helms, sponsor of the 1988 amendment in the Senate, made clear that the Commission's new interpretation of the broadcast indecency standard was to continue to govern,[97] and subsequent to the enactment of the amendment, the Commission has continued to apply its broadcast definition in the telephone context.[98]

On its face and stripped of the earlier construction which limited the standard to repetitive use of the "seven dirty words," the definition of indecency is inherently unclear. The Commission's various opinions in this matter have only added to the confusion. Purporting to provide guidance, the Commission has stated that material must not be " 'vulgar' or 'shocking,' " that "the manner in which the language or depictions are portrayed" is important,[99] that "material [that is] isolated or fleeting" may be acceptable,[100] and that indecency "requires careful consideration of context." [101]

The problem of vagueness has been seriously compounded by the Commission's specific statements that two

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[96] *1987 Hearings* at 212 (testimony of FCC General Counsel).

[97] 133 Cong. Rec. S16,794 (daily ed. Dec. 1, 1987) (remarks of Sen. Helms).

[98] Citing its 1987 broadcast decisions, the Commission has explained that it "believe[s] that the legislative history reveals that Congress intended the term 'indecent' to be defined as that term was defined in an analogous context in 18 U.S.C. § 1464." *Intercambio, Inc.*, 64 Rad. Reg. 2d (P&F) 1663, 1678 (1988) (footnote omitted); *accord Audio Enterprises, Inc.*, 64 Rad. Reg. 2d (P&F) 1681, 1695 (1988).

[99] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd at 932 (footnote omitted).

[100] *Id.* (footnote omitted).

[101] *Id.* (footnote omitted).

prongs of the *Miller* standard for obscenity have been made inapplicable.[102] Thus, the material need not appeal to the prurient interest and, most important, it may still be deemed indecent even though it has serious literary, artistic, political, or scientific value. The Commission's inability to define the role of serious merit has been particularly troublesome. The Commission has stated that serious merit "is simply one of many variables, and it would give this particular variable undue importance if we were to single it out for greater weight or attention than we give other variables." [103] The significance of "serious merit" is not further explained, nor are parties informed of what the other variables are. The Commission's interpretation is all the more confusing because it casts doubt on the very materials that the Commission once approved and on the rulings that broadcasters have been relying on for guidance for years.[104]

Indeed, the Commission appears to have concluded that it is simply impossible to provide meaningful guidance as to this shifting and elusive standard. The Commission stated that the term "patently offensive" must be 'construe[ed] . . . with reference to specific facts," [105] that "its meaning can only be given greater specificity on a case-by-case basis," [106] and that "we cannot list any particular language or material that will always be found indecent." [107] Yet, the Commission has directed those

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[102] *See 1987 Hearings* at 211 (testimony of FCC General Counsel). As the FCC's General Counsel testified in the course of the legislative history:

> [I]ndecency is essentially sexually explicit speech that need satisfy only the second prong of the three prong obscenity test; that is, it need not appeal to the prurient interest nor lack social, artistic, political or scientific value.

[103] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd at 932.

[104] *See* cases cited in note 92 *supra*.

[105] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd at 932.

[106] *Id.*

[107] *Id.* at 937 n.28.

subject to its regulation to interpret and apply the new standard:

> They must apply a generic definition with reference to the guidance provided by existing case law on the matter. [They] may not reasonably expect to relieve themselves of this legal obligation by demanding that we exercise their editorial judgment for them.[108]

The Commission has acknowledged that the task confronting broadcasters in particular is not an "easy one" given the lack of an accepted definition or further guidance from the Commission.[109] It is readily apparent, as the District of Columbia Circuit found in *ACT*, that "vagueness is inherent" in this definition of indecency.[110] The Commission has thus failed to provide adequate guidance as to the meaning of indecency and has rendered "principled review" by the courts impossible.[111]

Despite the government's suggestion that the burden of this vagueness will fall on pornography,[112] the burden in fact will fall heavily on protected speech.[113] The Commission has stated specifically that the indecency ban applies to the broadcast of news programs.[114] And the

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[108] *Id.* at 932.

[109] *Id.* at 933.

[110] 852 F.2d at 1344. That court held (we believe incorrectly) that this Court's decision in *Pacifica* prevented it from ruling that the Commission's standard is unconstitutionally vague, and "welcome[d] correction" from "Higher Authority." *Id.* at 1339.

[111] *Compare Meredith Corp. v. FCC*, 809 F.2d 863, 871 n.9 (D.C. Cir. 1987) ("[W]e note our reluctance as a prudential matter to delve into [Commission] determinations that do not readily lend themselves to principled review".).

[112] *See* Gov't Br. at 33.

[113] This is in direct contrast to the Commission's earlier limited application of the standard to the repetitive use of the seven dirty words, which this Court found would deter "only the broadcasting of patently offensive references to excretory and sexual organs and activities." *Pacifica*, 438 U.S. at 743 (plurality opinion) (footnote omitted).

[114] *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd at 937 n.31.

Commission's indecency cases have involved a range of material, including social satire,[115] political advertising,[116] informational programs,[117] classic works of literature,[118] modern drama addressing social issues,[119] and motion pictures.[120] To be sure, not all of these cases resulted in a ruling that the material was indecent within the meaning of Section 1464. But even in those cases in which the Commission ruled that the material was not indecent, its rulings had a particularly grudging quality and were unlikely to give much clarity or comfort to those attempting to construe the definition in similar situations.

The Commission's finding that the broadcast of excerpts from *Ulysses* would not be indecent exemplifies the approach. The Commission stated only that "we would not expect that the Commission would find such references, dispersed as they would have been throughout the three-hour reading of this work of literature, to be patently offensive." [121] It affords amici and others little prac-

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[115] *See, e.g., Infinity Broadcasting Corp. of Pennsylvania*, 2 FCC Rcd 2705 (Howard Stern morning radio program), *reconsideration and clarification granted in part, denied in part*, 3 FCC Rcd 930 (1987), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[116] *See, e.g.*, Letter to Hon. John E. Bourne, Jr. from Chief, Mass Media Bureau (Apr. 7, 1988) (political advertisement containing the word "clocksucker" in reference to the local mayor's desire to purchase a clock for City Hall).

[117] *See, e.g.*, Letter to Mr. and Mrs. Roland Orle from Chief, Mass Media Bureau (Apr. 7, 1988) (documentary on sex education).

[118] *See, e.g.*, Letter to Thomas Byrne from Chief, Mass Media Bureau (Apr. 7, 1988) (*Ulysses*).

[119] *See, e.g., Pacifica Found., Inc.*, 2 FCC Rcd 2698 (play dealing with AIDS and homosexuality), *reconsideration and clarification granted in part, denied in part sub nom. Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930 (1987), *vacated in part and remanded sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[120] *See, e.g., Kansas City Television, Ltd., Order*, FCC 88-274 (released Aug. 5, 1988) (film "Private Lessons").

[121] Letter to Thomas Byrne at 2 n.1. One Commissioner stated that " 'Ulysses' is probably indecent" and that he is "amazed it made it as a classic." Wall St. J., May 26, 1987, at 35, col. 1.

tical guidance to know that they apparently need not fear sanctions if they present a three-hour reading of *Ulysses*, or indeed that other established "works of literature" may be read aloud if the sexual references are dispersed over a three-hour period. It is no answer to suggest that careful study of the Commission's decisions will yield answers to these difficult questions of interpretation. They do not, and many broadcasters are simply unwilling or unable to employ lawyers routinely to attempt to advise them as to the appropriate course of conduct. Thus, despite the government's consistent efforts in its brief to portray the statute as protecting children against pornography, its intent and actual sweep are far broader, a problem compounded by the vagueness of the Commission's definition.

The Second Circuit, like the district court here, has held the Commission's standard unconstitutional.[122] Those rulings were clearly correct. This Court has consistently struck down on vagueness grounds statutes which have sought to regulate indecency, without clearly defining that term. Thus, for example, in *Bantam Books, Inc. v. Sullivan*, the Court held unconstitutional a state law creating a commission that was "to educate the public concerning [materials] containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth. . . ." [123] Finding that the law was unconstitutionally vague and that the commission had not done anything to make it more precise, the Court explained that "[t]he distributor is left to speculate whether the Commission considers his publication obscene or simply harmful to juvenile morality." [124] Similarly, in *Cohen v. California*, the Court invalidated a conviction imposed for wearing a jacket bearing a four-letter word.[125] The Court concluded that the statute did not put one "on notice that certain kinds of otherwise per-

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[122] *Carlin Communications, Inc.*, 837 F.2d at 558-60.

[123] 372 U.S. at 59.

[124] *Id.* at 71.

[125] 403 U.S. 15 (1971).

missible speech or conduct would nevertheless . . . not be tolerated in certain places." [126] In *Hustler Magazine v. Falwell*, the Court held that a parody which used sexual innuendo was protected speech, noting that a standard of " '[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." [127] The legislation here is similarly unconstitutional because it incorporates an unconstitutionally vague and overbroad definition.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the Central District of California invalidating the indecency ban in Section 223(b) should be affirmed.

Respectfully submitted,

Of Counsel:
SAM ANTAR
MARIAN E. LINDBERG
CAPITAL CITIES/ABC, INC.
1330 Avenue of the Americas
New York, New York 10019

Of Counsel:
HOWARD F. JAECKEL
CBS INC.
51 West 52 Street
New York, New York 10019

TIMOTHY B. DYK
Counsel of Record
TERESA D. BAER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Amici and Capital Cities/ABC, Inc. and CBS Inc.

---

[126] *Id.* at 19; *see also Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (summarily vacating and remanding conviction under disorderly persons statute prohibiting use of "offensive," "profane," or "indecent" language in a public place); *Brown v. Oklahoma*, 408 U.S. 914 (1972) (summarily vacating and remanding conviction under statute barring "any obscene or lascivious language or word in any public place or in the presence of females"); *Lewis v. City of New Orleans*, 408 U.S. 913 (1972) (summarily vacating and remanding conviction under breach of peace statute prohibiting wantonly cursing, reviling, or using "obscene or opprobrious language" towards an on-duty police officer).

[127] 108 S. Ct. at 882.

HENRY GELLER
DONNA LAMPERT
1776 K Street, N.W.
Suite 900
Washington, D.C. 20006
Counsel for Action for Children's Television

JOHN A. POWELL
C. EDWIN BAKER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
Counsel for American Civil Liberties Union

STEVEN A. LERMAN
DENNIS P. CORBETT
LAURA B. HUMPHRIES
LEVENTHAL, SENTER & LERMAN
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006
Counsel for Infinity Broadcasting Corporation

FRITZ E. ATTAWAY
1600 I Street, N.W.
Washington, D.C. 20006
Counsel for Motion Picture Association of America, Inc.

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
1771 N Street, N.W.
Washington, D.C. 20036
Counsel for National Association of Broadcasters

HOWARD MONDERER
MOLLY PAUKER
1331 Pennsylvania Ave., N.W.
Suite 700 South
Washington, D.C. 20004
Counsel for National Broadcasting Company, Inc.

LOIS J. SCHIFFER
KAREN CHRISTENSEN
2025 M Street, N.W.
Washington, D.C. 20036
Counsel for National Public Radio

Of Counsel:
SUSAN M. LISS
JAN G. LEVINE
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036

ANDREW JAY SCHWARTZMAN
MEDIA ACCESS PROJECT
2000 M Street, N.W.
Washington, D.C. 20036
Counsel for People for the American Way

PAULA A. JAMESON
NANCY H. HENDRY
1320 Braddock Place
Alexandria, Virginia 22314
Counsel for Public Broadcasting Service

J. LAURENT SCHARFF
JAMES M. SMITH
REED SMITH SHAW & MCCLAY
1200 18th Street, N.W.
Washington, D.C. 20036
Counsel for Radio-Television News Directors Association

JANE E. KIRTLEY
800 18th Street, N.W.
Washington, D.C. 20006
Counsel for The Reporters Committee for Freedom of the Press

BRUCE W. SANFORD
R. B. QUINN
BAKER & HOSTETLER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Counsel for Society of Professional Journalists

Of Counsel:
DAVID D. HILLER
CHARLES J. SENNETT
TRIBUNE COMPANY
435 North Michigan Avenue
Chicago, Illinois 60611

ROBERT A. BEIZER
SCHNADER, HARRISON, SEGAL & LEWIS
1111 19th Street, N.W.
Washington, D.C. 20036
Counsel for Tribune Broadcasting Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
ATTORNEY GENERAL OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND
RICHARD L. THORNBURGH,
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Cross-Appellant

v.

SABLE COMMUNICATIONS OF CALIFORNIA, INC.

On Appeal from the United States District Court for the Central District of California

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BRIEF OF AMICUS CURIAE, PACIFICA FOUNDATION IN SUPPORT OF APPELLANT/CROSS-APPELLEE

WILLIAM J. BYRNES
Counsel of Record
JOHN CRIGLER
HALEY, BADER & POTTS
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-0606
Counsel for
Pacifica Foundation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF AMICUS CURIAE, PACIFICA FOUNDATION IN SUPPORT OF APPELLANT/CROSS-APPELLEE

INTEREST OF AMICUS CURIAE

Pacifica Foundation, Inc. is a non-profit corporation organized in 1946 under the laws of the State of California for purposes which include the following:

> (c) . . . to encourage and provide outlets for the creative skills and energies of the community; to conduct classes and workshops in the writing and producing of drama; to establish awards and scholarships for creative writing; to offer performance facilities to amateur instruments, choral groups, orchestral groups and music students; and to promote and aid other creative activities which will serve the cultural welfare of the community.
>
> (d) . . . to engage in any activity that shall contribute to a lasting understanding between nations and between the individuals of all nations, races, creeds and colors; to gather and disseminate information on the causes of conflict between any and all of such groups; and through any and all means compatible with the purpose of this Corporation, to promote the study of political and economic problems and of the causes of religious, philosophical and racial antagonisms.
>
> (e) . . . to promote the full distribution of public information; to obtain access to sources of news not commonly brought together in the same medium; and to employ such varied sources in the public presentation of accurate, objective, comprehensive news on all matters vitally affecting the community."

Pacifica is the licensee of six noncommercial educational FM broadcast stations: KPFA and KPFB, Berkeley, California; KPFK, Los Angeles, California; KPFT, Houston, Texas; WBAI, New York, New York; and WPFW, Washington, D.C. Pacifica also operates an international news service and a 30,000 tape archive which distribute programming to noncommercial radio stations across the nation. Pacifica has pioneered the

field of listener-supported, commercial-free broadcasting since KPFA went on the air on April 15, 1949.

Pacifica's corporate purposes have been implemented by making its stations a forum for thought-provoking programs of artistic, cultural, and political significance. The many celebrated writers, musicians, and social commentators who were first broadcast on a Pacifica station include: William Carlos Williams, Langston Hughes, John Cage, Pierre Boulez, Philip Glass, John Coltrane, Aldous Huxley, Jean Renoir, Bob Dylan, Pauline Kael, I.F. Stone, Malcolm X, Caspar Weinberger, Barry Commoner, Germaine Greer, Alice Walker, and Martin Luther King, Jr. In addition to regularly scheduled news and public affairs programs, Pacifica provides in-depth coverage of contemporary events of great public interest. For example, Pacifica provided gavel-to-gavel coverage of the Iran-Contra Congressional hearings and the hearings on the nomination of Mr. Robert Bork to be a Justice of this Court.

Pacifica's "provocative programming" has often been made the subject of petitions to deny Pacifica licenses. *See*, e.g. *Pacifica Foundation (KPFA)*, 1 Rad Reg. 2d (P&F) 747, 750 (1964), where the Federal Communications Commission conducted an inquiry into complaints regarding readings from the works of Edward Albee, Lawrence Ferlinghetti, Edward Pomerantz, and Robert Creeley (the inquiry discussed the "error" of airing the Ferlinghetti and Creeley programs in renewing the broadcast licenses of KPFA and KPFB); and *Pacifica Foundation (WPFW)*, 95 FCC 2d 750 (1983), where the FCC considered and denied complaints alleging, *inter alia*, that WPFW had failed to present balanced coverage of a variety of issues, including U.S. involvement in El Salvador, U.S. development of nuclear weapons, the Air Traffic controller's strike, and abortion.

Pacifica has also been accused of airing "indecent" material. One such complaint led to this Court's decision

in *FCC v. Pacifica Foundation*, 438 U.S. 726, *reh. den.*, 439 U.S. 883 (1978), where a sharply divided Court upheld the FCC's narrow authority to "channel" the "repetitive, deliberate use" of broadcast material referring to sexual or excretory activities in a patently offensive manner. The instant case raises questions of whether the authority affirmed in *Pacifica* remains valid, and whether that authority may be substantially expanded and applied to non-broadcast media. Pacifica's experience with the Commission indecency standard is uniquely relevant to these questions.

For the nine years following *Pacifica*, the FCC applied an indecency standard that channelled indecent language —pragmatically defined as the seven words at issue in *Pacifica*—to hours after 10:00 p.m. On April 29, 1987, the Commission issued three rulings and a public notice which dramatically enlarged the scope of that long-standing policy. *Pacifica Foundation, Inc. (KPFK)*, 2 FCC Rcd 2698 (1987); *Regents of the University of California*, 2 FCC Rcd 2703 (1987); *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987); *New Indecency Enforcement Standards To Be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd 2726 (1987). Under the new standard established by these rulings, the Commission defined indecency as "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Enforcement Standards*, 2 FCC Rcd at 2726, citing the "generic" definition set forth in *Pacifica Foundation (WBAI)*, 56 FCC 2d 94 (1975), *recon. denied*, 59 FCC 2d 892 (1976), *rev'd*, *Pacifica Foundation v. FCC*, 556 F.2d 9 (1977), *rev'd*, *FCC v. Pacifica Foundation*, 439 U.S. 726 (1978), *supra*. The definition of indecency was expanded to include visual images as well as words, and "innuendo or double entendre" as well as literal references to sexual or ex-

cretory activities or organs. 2 FCC Rcd at 2706. Broadcast of any material which was "indecent" under the new definition was initially considered actionable if the broadcast occurred when there was a "reasonable risk" that children might be in the audience. 2 FCC Rcd at 2726.

On reconsideration, the Commission discussed and reaffirmed its expanded definition of indecency. *Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987). As the constitutional principle governing its standards, it stated that "we may only do that which is necessary to restrict children's access to indecent broadcasts; we may not go further so as to preclude access by adults who are interested in seeing or hearing such material." 3 FCC Rcd at 931. It nonetheless indicated that the "merit" of the material broadcast was only "one of many variables" and would not, in and of itself, immunize an otherwise actionable broadcast. *Id.* at 932. The "contemporary community standards" to be applied would be determined by reference to what the FCC Commissioners believed the average broadcast viewer or listener would find patently offensive. *Id.* at 933. The prohibition against indecent broadcasts when there was a reasonable risk that children would be in the audience was modified in light of the Commission's conclusion that such a standard would amount to "an effective ban" which would "be contrary to current law that indecent but not obscene material can be restricted but not banned," *Id.* at 934, n.47, citing *Pacifica*, 438 U.S. at 757-61. The Commission stated its "current thinking" that it would be reasonable to expect that children would not be in the audience after midnight. *Id.*

The Commission's indecency standard remains in flux. After finding that the generic definition of indecency resulted in uncertainty for broadcasters, the United States Court of Appeals for the District of Columbia Circuit upheld the definition in light of *Pacifica*, but found no

rational basis for channeling all indecent material until after midnight. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). Congress, meanwhile, in the "Helms Amendment," Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988), instructed the Commission to institute a 24-hour per day ban on indecency. The FCC implemented such a regulation. *Broadcast Services, Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. § 1464 on a Twenty-Four Hour Per Day Basis*, 53 Fed. Reg. 52425 (Dec. 28, 1988). The Circuit Court stayed the effectiveness of that regulation. *Action for Children's Television v. FCC*, No. 88-1916 (D.C. Cir. filed Dec. 30, 1988, stay granted Jan. 23, 1989). The Government in the instant case advocates a position which would compound the uncertainty now surrounding indecent broadcasts by exporting that standard to a non-broadcast medium.

The Commission's new definition of indecency has had a real—not merely a theoretical—chilling effect on Pacifica's programming.[1] Under the new indecency policy, Pacifica has been censured for discussing excerpts of a play which had extended theatrical runs in Los Angeles and New York and has won critical acclaim from the *New York Times, Pacifica Foundation, Inc. (KPFK)*, 2 FCC Rcd 2698 (1987), and has been informally criticized for other programming decisions. While the Commission declined to issue a declaratory ruling on the question whether a reading from James Joyce's novel *Ulysses* on Pacifica's New York station, WBAI, would be actionable under the new policy[2], individual Commis-

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[1] Pacificia's recent experiences are described in more complete detail in a forthcoming law review article. Crigler and Byrnes, "Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy," 38 Cath. U. L. Rev. —— (No. 2, Winter, 1989).

[2] Letter from James C. McKinney, Chief, Mass Media Bureau, FCC to Counsel for Pacifica (June 5, 1987). Commission staff

sioners publicly expressed doubts as to the literary merit of *Ulysses* and its suitability for broadcast.[3]

As a result of the new indecency policy, Pacifica has reluctantly declined to broadcast readings from the works of Allen Ginsberg[4], William Burroughs, Woody Guthrie, and Grace Cavaleri. It has cancelled or censored health programs and programs directed at a gay or lesbian audience. And it has suppressed musical selections ranging from classic blues artists to contemporary musicians such as Gil Scott Heron and John Lennon. Recently, it deleted portions of a reading of *The Satanic Verses* by Salman Rushdie. Thus, the practical effect of the current definition of "indecency" has been to constrain or silence one of the foremost outlets for literary, artistic and social expression in the country.

SUMMARY OF ARGUMENT

The narrow exception to *Miller v. California*, 413 U.S. 15 (1973), carved out in *Pacifica* should not be extended. Extension of the *Pacifica* exception to cable television and to mass mailings has already been rejected. The factual premises upon which that narrow exception were originally predicated do not apply to telephone services, and, indeed, no longer apply to broadcast services. The criteria used to justify the exception are no longer valid. The assumption embraced by *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), that broadcasting is en-

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subsequently denied a listener complaint against the broadcast of *Ulysses*, not because the work was deemed to be "decent," but because the listener had failed to submit a tape or transcript of the broadcast. Letter from Alex D. Felker, Chief, Mass Media Bureau, FCC to Thomas Byrne (April 7, 1988). It simply ignored the fact that Pacifica had previously supplied the Commission with the text of the relevant part of *Ulysses*.

[3] Davis, "(Bleep) (Bleep) (Bleep) And Yes I said Yes I Will Say Yes," *Wall Street Journal* (May 26, 1987), p. 35, col. 1.

[4] *New York Times* January 6, 1988, Section C, page 22.

titled to only attenuated First Amendment protection on account of spectrum scarcity has been rejected by the FCC itself. The number, variety, and availability of communications media have increased so dramatically over the past decade that no medium can any longer be claimed to be *uniquely* pervasive or *uniquely* accessible to children.

Nor can the *Pacifica* exception be extended from the limited channeling of constitutionally protected speech to a complete ban of that speech. *Pacifica* was not designed to permit the Government to displace parents from the role of supervising the listening and viewing habits of their children.

ARGUMENT

I. THERE IS NO JUSTIFICATION FOR DEPARTURE FROM THE STANDARD ESTABLISHED IN *MILLER V. CALIFORNIA*

A. There Is No Basis for Extending the *Pacifica* Exception to the *Miller* Standard to Other Media

Miller establishes a distinction between constitutionally protected speech and constitutionally unprotected speech which was the culmination of many years of deliberation by the Court and successfully balances the Constitutionally protected freedom of speech against any Governmental interest in protecting the public from language found offensive as a result of its sexual content. *Miller* has been deemed to control even when statutes have used, in addition to the word "obscene," similar but broader terms such as "indecent." This Court has held that, where the term "indecent" is used in a federal statute to describe types of expression which might give rise to criminal sanctions, the term must be construed as referring only to "patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in *Miller v. California*." *Hamling v. United States*, 418 U.S. 87, 114 (1974), quoting *United States*

v. 12 200-Ft. Reels of Super 8mm Film, 413 U.S. 123, 130 n.7 (1973).

The Second Circuit has applied this principle to the type of telephone service addressed in this proceeding, declaring that: "Were the term indecent to be given meaning other than *Miller* obscenity, we believe the statute would be unconstittuional." *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 560 (1988), *cert denied*, 102 L.Ed 2d 324 (1988). The Government fails to adduce any persuasive reasons as to why the *Miller* standard is an inadequate basis for addressing the services at issue.

The Government seeks a major enlargement of the scope of the narow exception to *Miller* made in *FCC v. Pacifica Foundation*, 438 U.S. 726, *reh. den.*, 439 U.S. 883 (1978). It seeks to detach the *Pacifica* exception from the specific assumptions with respect to the nature of the media upon which it was predicated and give it an independent life apart from those factors. It seeks to extend the exception from the one medium to which it was applied and make it applicable to other media as well. It seeks to metamorphosize the exception from channeling into outright banning.

The Government plays down the highly limiting factors involved in *Pacifica* in its effort to extend it to the medium of telephone information or "976" services. In doing so, moreover, it is attempting to expand the theoretical basis for the *Pacifica* exception, so that it can be reapplied to the broadcast medium in a way that would further reduce the First Amendment protection afforded broadcasters and members of the larger public seeking to find broadcast outlets for their work. The Commission has argued that the Court's opinion in this case is relevant to an appeal of an FCC decision to ban the broadcast of indecent material on a 24-hour-a-day basis.[5]

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[5] FCC Motion to Hold Case in Abeyance of February 2, 1989, p. 2, *Action for Children's Television v. FCC*, No. 88-1916 (D.C.

Pacifica is the broadcaster one of whose programs was at issue in the Court's 1978 decision. While Pacifica has no interest in the type of "976" service at issue in the decision below, it is deeply concerned with the attempt to enlarge the narrow exception made in the Court's 1978 decision into something vastly larger.

Implicit in much of what the Government is saying now is that the broadcast medium is no longer "unique," as the Court believed it was in 1978. On this basis, the Government seeks to justify extension of the *Pacifica* exception to additional media. Pacifica agrees that the broadcast medium is not nearly so special as the Court believed it was in 1978. The implication to be drawn from that fact, however, is that the *Pacifica* exception should no longer be treated as valid limitation on the First Amendment protections afforded to the broadcast medium—not, as suggested by the Government, that it be extended to other media as well.

The Court's finding in *Pacifica* that an exception to the *Miller* standard was justified depended upon the conjunction of the three following conclusions about the nature of the broadcast medium, as the Court perceived it in 1978, 438 U.S. at 748-49:

(1) the belief that broadcasting should receive the most limited form of First Amendment protection on the basis of the distinction as to the scarcity of broadcast frequencies made in *Red Lion*,

(2) the uniquely pervasive presence of broadcasting, especially with respect to homes, and

(3) broadcasting's unique accessibility to children.

The common theme of each of these points is the perceived uniqueness of the broadcast medium. In quoting

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Cir. filed Dec. 30, 1988, stay granted Jan. 23, 1989). The motion was filed after the court of appeals had stayed the agency decision under review.

its ruling in *Pacifica*, in *Bolger v. Youngs Drug Products*, 463 U.S. 60, 74 (1983), the Court highlighted the repeated use of the word "uniquely." The *Pacifica* ruling has been extended to no other media.

The Government is now, in essence, saying that broadcasting is not unique after all. When the Government states, for example at page 27 of its Brief, that: "Like radio and television, the telephone is a technological means of distributing messages into the home that is *uniquely* accessible to children'" (emphasis added), it is engaging in a contradiction of terms. The various media cannot all be "uniquely" pervasive, accessible, or scarce. The inference to be drawn is that the broadcast medium is not the unique medium the Court was told it was in 1978.

The Government ignores the fundamental premise of the Constittuional portion of the *Pacifica* opinion, the principle, articulated in *Red Lion*, that broadcasting was a medium subject to a lesser degree of First Amendment protection than other media. Now, on the assumption that the 1978 conclusion is still valid even in the absence of the scarcity rationale, the Government seeks to extend its reach substantially beyond what was contemplated in 1978. In effect, the Government wants the fruit to grow even after the tree's roots have been severed.

B. The Scarcity Rationale for Diminished First Amendment Protection Has Become of Suspect Validity Even for Broadcasters and Is Certainly Not Applicable to Other Media

In its 1975 decision affirmed in *Pacifica*, the Commission relied upon scarcity of spectrum space as one of the distinct bases to support its position that broadcasters were entitled only to attenuated First Amendment protection. *Pacifica Foundation (WBAI)*, 56 FCC 2d at 97 (1975). The Commission specifically relied upon the Court's decision in *Red Lion* for the proposition that

the broadcast medium is fundamentally different from other modes of communication and expression. Para. 8.

Part IV-C of the Court's opinion affirming the FCC decision, the only part of the opinion on the Constitutional issue joined by five members of the Court, begins its analysis with the proposition that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." 438 U.S. at 748. The authority relied upon for this proposition was the disparity of treatment between broadcasters and newspapers provided in the contrasting decisions of *Red Lion* and *Miami Publishing v. Tornillo*, 418 U.S. 241 (1974).[6]

The critical dependency of *Pacifica* upon the *Red Lion* rationale for diminished First Amendment protection for broadcasters was underscored five years later in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). Observing, at 74, that: "Our decisions have recognized that the special interest of the Federal Government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication" and citing *Red Lion*, the Court concluded that *Pacifica* could not be extended to direct mail solicitations. Even before *Bolger*, the Court had distinguished broadcasting and the mailing of messages on the basis

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[6] Additional cases cited in Justice Powell's concurring opinion (438 U.S. at 759) don't add to the rationale set forth in *Red Lion*. *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977), merely cross references *Capital Broadcasting Co. v. Mtichell*, 333 F. Supp. 582 (D.C. Cir. 1971), *aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972). That District Court decision upholding the statutory ban on commercial speech advertising cigarettes was predicated on the belief that "Congress has the power to prohibit the advertising of cigarettes in *any media*." *Id.* at 584 (emphasis added). *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 101 (1973) simply follows the reasoning of *Red Lion* that the scarcity of broadcast spectrum justifies attenuated First Amendment protection.

of scarcity. In *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 542-43 (1980), it found that communicating through billing envelopes differs from the use of broadcast frequencies in that the broadcaster communicates "through use of a scarce publicly owned resource."

In distinguishing cable television from broadcasting under *Pacifica*, the Tenth Circuit gave, as the first reason why broadcast has received the most limited First Amendment protection, the "physical scarcity of broadcast frequencies." *Jones v. Wilkinson*, 800 F.2d 989, 999 (10th Cir. 1986), *aff'd sub nom. Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.). The Ninth Circuit found also that "[t]he Supreme Court's determination to allow greater government intrusion into the affairs of broadcasters rests on the physical scarcity of radiowaves." *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403 (9th Cir. 1985), *aff'd sub nom. City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

In invalidating a statute forbidding Pacifica to editorialize, *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), the Court assumed the existence of scarcity as a predicate for broadcast regulation: "The fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.'" 468 U.S. at 377. Even then a restriction on speech, the Court found, must be "narrowly tailored" to further a substantial governmental interest. It treated *Pacifica* as "consistent with the approach taken in our other broadcast cases," such as *Red Lion*, 468 U.S. at 380, n.13, and cited *Pacifica* as an example of the critical examination required in light of the particular circumstances of each case. 468 U.S. at 381.

The Court recognized, however, that the scarcity rationale has been becoming increasingly questionable.

> The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. . . . We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.

League of Women Voters, 468 U.S. at 376, n.11 (1984).

Since that time, the Commission has given a loud and clear signal that the time has come to reconsider broadcast regulation premised upon the scarcity rationale. It has disavowed the entire scarcity rationale underlying the Court's conclusions in *Red Lion. Syracuse Peace Council*, 2 FCC Rcd 5043, 5054-57 (1987), *aff'd on other grounds, Syracuse Peace Council v. FCC*, No. 87-1516, D.C. Cir., decided February 10, 1989, WL 9226.

The Commission studied the scarcity it had previously used as the predicate for a variety of regulatory actions and found that such scarcity no longer existed. *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 145 (1985). The Commission found that alternative media to broadcasting, including cable, video cassette recorders, low power television, multichannel multipoint distribution, and other electronic media, had proliferated. 102 FCC 2d at 208-217. Building on those detailed findings of fact concerning the changing nature of the industry, the Commission concluded that no "scarcity rationale justifies differential First Amendment treatment of the print and

broadcast media." *Syracuse Peace Council*, 2 FCC Rcd at 5054. The Commission concluded that:

> . . . an evaluation of First Amendment standards should not focus on the *physical differences* between the electronic press and the printed press, but on the *functional similarities* between these two media and upon the underlying values and goals of the First Amendment. We believe that the function of the electronic press in a free society is identical to that of the printed press and that, therefore, the constitutional analysis of government control of content should be no different.

Syracuse Peace Council, 2 FCC Rcd at 5055. The Commission said it failed to see how the people's right to receive ideas unfettered by government interference "changes when individuals choose to receive ideas from the electronic media instead of the print media." *Syracuse Peace Council*, 2 FCC Rcd at 5043. Recently, the Commission has explicitly disavowed its earlier reliance upon the scarcity rationale to sustain action with respect to the broadcast of alleged indecency. *Pacifica Foundation (KPFK)*, 2 FCC Rcd 2698, 2699 (1987), *reconsideration sub nom. Infinity Broadcasting Corp.*, 3 FCC Rcd 930, *reversed in part, Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

The courts have recognized that in the absence of a spectrum scarcity rationale upon which to premise a more limited degree of First Amendment protection, there is no basis for departing from the general standard established in *Miller*. Speech transmitted by cable TV, a number of lower courts have held, may not be regulated under *Pacifica*. *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah, N.D. 1982); *Home Box Office Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah, C.D. 1982); *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985); *Community Television v. Wilkinson*, 611 F. Supp. 1099 (D. Utah, C.D. 1985), *aff'd sub nom. Jones v. Wil-*

kinson, 800 F.2d 989 (10th Cir. 1986), *aff'd sub nom. Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.). The lack of scarcity with respect to cable has been a prominent distinction cited between cable and broadcasting. In response to an argument by Morality in Media, that cable and broadcast are both "scarce media," it was ruled that "cable is not limited to a finite number of channels the way broadcasting is . . . . the number of additional channels, in a technical sense, is subject to extensive expansion." *Community Television v. Wilkinson*, 611 F. Supp. at 1113. "If one turns it on, cable provides a larger number of channel and subject choices than does broadcast." *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1168 (D. Utah, N.D. 1982). "[T]he public airways are crowded and their available use allocated by the FCC. In a sense, the FCC has made the subscription choice for the viewer." *Id.* at 1169.

At the present time, the majority of households in America receive television service not through reception of a signal over the air but instead through cable television systems.[7] This percentage is continuing to grow rapidly. In essence, the universe of available broadcast services is increasingly not the relatively small number of options available from over-the-air broadcast stations using the limited electromagnetic spectrum, but the much larger and more open-ended number of options available through local cable distribution systems.

The once sharp dichotomy between print media (under *Tornillo*) and electronic media (under *Red Lion*) has broken down. USA Today, the Wall Street Journal, and the New York Times, for example, are now distributed by satellite.[8] They therefore use the electromagnetic

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[7] 54.8% of TV households now subscribe to cable television services. *Broadcasting*, March 13, 1989, p. 14.

[8] *See, e.g.*, the 1988 Annual Report of Gannett Co., Inc., p. 57, the 1987 Dow Jones Annual Report, "Operating Services," and the 1981

spectrum as a part of their distribution systems. Their use of the spectrum is, in fact, greater than that of the local broadcaster since they use the spectrum over the entire country and other parts of the globe covered by the satellite's beam and not merely in the much smaller geographical area covered by a terrestrial broadcast station.

Since 18 U.S.C. § 1464, the statute addressed in *Pacifica*, covers, by its terms, not only broadcasts but any communication by transfer of electrical energy, the statute, under the Government's reading of the law, could apply to alleged indecency against those newspapers or any others using the spectrum to transmit their editorial product. Furthermore, since the new 47 U.S.C. § 223(b) addressed here applies, by its terms, to any use of the telephone to communicate for commercial purposes, and newspapers use the satellite services of communications common carriers, newspapers come within the scope of the statute. Such a result is clearly prohibited under the Court's vindication of the First Amendment rights of newspapers in *Tornillo*. Indeed, the absurdity of the Government's refusal to accept First Amendment limitations on the literal reading of these statutes is illustrated by the fact that this reading threatens telephone services such as Westlaw or Lexis which transmit putatively indecent materials in decisions of courts or of the FCC.

C. None of the Electronic Media Have a Uniquely Pervasive Presence

In the absence of the scarcity of broadcast frequencies found in *Red Lion*, the remaining two criteria are not reliable bases for departing from *Miller* standards. In *Roy City*, 555 F. Supp. at 1170 (D. Utah, N.D. 1982), the court recognized that pervasiveness alone might not furnish a fundamental basis for legal distinction. "The

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Annual Report of the New York Times. In addition, other newspapers use the electromagnetic spectrum in terrestrial microwave links.

Court finds great difficulty in distinguishing (other than popcorn) between going to the movies at a theatre and having the movies come to me in my home through electronic transmission over wire. . . . There is no distinction made with the *Miller* standard as to whether one goes to the movies or prefers to have the movies come into one's home."

Pervasiveness is a quality that has come to be shared by a variety of electronic media, including, for example, broadcast, telephone, cable, video casettes, compact discs, and audio casettes. No one of these media can any longer be viewed as *uniquely* pervasive. Even when added together, the sum of communications through electronic media is less intrusive than is the accumulation of the routine and persistent use of language by peers in numerous unsupervised places, from schoolyards to bus stops. Perhaps, the putative relevance of pervasiveness to the question of First Amendment protection has been tacitly assumed to lie in the fact that the state can control a relatively small number of speakers through a limited number of media outlets in a way that it could not effectively control the numerous speakers expressing themselves through other means. The number of speakers, however, has grown enormously as the electronic media have proliferated. There has been an unfortunate tendency to question First Amendment values each time a new medium appears and begins to provide a mechanism for a significant amount of communication. The medium does not, however, change the fundamental nature of communications. Constitutional values are enduring ones that should not change with the introduction of each new mechanism for communications.

D. None of the Electronic Media is Uniquely Accessible to Children

While it is patently true that communications of all kinds are becoming more directly available in the home, that is simply a part of one of the fundamental social

transformations of the current generation. The fact that a movie may be seen at home, whether by conventional broadcast transmission, cable, video tape, or direct satellite reception, in no way makes it more dangerous to the young. The fact that a song lyric may be heard on the radio, on record, cassette, compact disc, or the telephone rather than at a concert or on the street makes it no more dangerous to the young. Quite the opposite, by being brought into the home it becomes more subject to parental control. It permits parents to make better informed and more effective judgments about what a particular child of a given age and state of development should or should not be permitted to see or hear. It permits parents to make such judgments as individuals rather than surrendering their role to such bodies as the appointees to the Federal Communications Commission or a jury in Salt Lake City. It helps avoid the danger discussed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), of Governmental usurpation of the parent's role.

The intrusiveness that should be of concern is the proposed Governmental intrusiveness into what people see and hear in their homes. A great many people want the proliferating variety of electronic services which are becoming available. The implication of the proposed censorship is that the Government should prevent the public from receiving these services. The basic responsibility for controlling children is that of parents. If parents believe that certain material is not appropriate for their children, it is their individual responsibility to take steps to control their children's practices. If they are unwilling to do so, the inference may properly be drawn that the matter is not one parents care about all that much. The Government has no right to usurp the role of parents and suppress speech that parents themselves do not suppress and, in fact, willingly receive.

Since 1978, the range of controls available to parents over the use of broadcast media by their children has

grown. Since most television broadcasts are now seen over cable systems, broadcast materials have become subject to the same lock box features of cable systems discussed in *Community Television v. Wilkinson*, 611 F.2d at 1112. Even aside from cable controls, television receivers are now sold with lockout features that can be programmed by parents to restrict their children's viewing if they desire. While access by children to any medium of communication can probably not be totally avoided, the *unique* degree of access that concerned the Court in 1978 no longer exists. Instead, an increasingly large array of media are accessible. None of these media has a role that can any longer be viewed as unique.

The lack of unique accessibility to children is illustrated by the fact that, when the proponents of the Helms Amendment, which bans broadcast "indecency" on a 24-hour a day basis sought some justification for protecting children in the wee hours of the morning, the only rationale they could find was the possibility that children might use VCR recording machines and programmable tape decks to record such broadcasts and listen to them later. Remarks of Senator Helms, 134 Cong. Rec. S9912 (July 26, 1988) and Remarks of Representative Dannemeyer, 134 Cong. Rec. H7563 (Sept. 14, 1988). The same material may be more readily available from a video rental shop or from a tape borrowed from a friend. The point is that, under the analysis made by the proponents of the Helms Amendment, the pervasive medium is not the broadcast medium. It is the VCR medium.

The list of purportedly "unique" media that proponents of censorship would like to censor grows increasingly large. Efforts to create an ever expanding list of "unique" media, however, merely underscores the fact that there is no longer any medium of unique pervasiveness and intrusiveness—and therefore no basis for any exception to the generally applicable standard the Court established in *Miller*.

II. EVEN IF *PACIFICA* WERE APPLICABLE, THERE WOULD BE NO BASIS FOR A COMPLETE BAN

Offensive speech is protected by the First Amendment. *Cohen v. California*, 403 U.S. 15, 23 (1971). In *Pacifica*, Justice Stevens noted that "indecent" speech is "not entirely outside the protection of the First Amendment." 438 U.S. at 746. Justice Powell treated the afternoon monologue as "offensive but protected speech," and emphasized that the Court's opinion did not prevent Pacifica from broadcasting it during late evening hours. *Id.* at 759-760. Justice Brennan observed the Court's "unanimous agreement that the Carlin monologue is protected speech." *Id.* at 763.

The Court contemplated nothing more than a channeling of the speech. In its 1975 decision, the FCC had embraced the concept of "*channeling*" as opposed to an outright ban. *Pacifica Foundation (WBAI)*, 56 FCC 2d at 98 (emphasis in original). The Court's opinion emphasized that the decision rested on a "nuisance rationale." 438 U.S. at 750. Justice Powell observed that the Commission had sought to "channel" the program "to hours when the fewest unsupervised children would be exposed to it." 438 U.S. at 757.

The FCC initially treated *Pacifica* as a very narrow decision largely limited to a set of unusual facts. Two weeks after the decision, the Commission's Chairman told an audience "the circumstances of WBAI's broadcast are about as likely to occur again as Haley's Comet."[9] The Commission declared:

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[9] Wing, *Morality and Broadcasting: FCC Control of 'Indecent' Material Following Pacifica*, 31 Fed. Comm. L.J. 145, 169 (1978-79). The author, Susan Wing, observed at 171 that, despite the FCC's initially restrained treatment:

> An administrative agency—even an independent agency such as the FCC—in which decisions are made by political appointees with terms of limited duration, is likely to be subject to pressures from the executive branch and from Congress. This,

> The Supreme Court's decision in [*Pacifica*] affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding.

WGBH Educational Foundation, 69 FCC 2d 1250, 1254 (1978). It ruled, in particular, that "late evening hours such as are present here in the case of the 11:00 p.m. program are not within the intent of our *Pacifica* decision." *Id.*, n.6.

Even during the last few years, when the FCC has begun a shift toward censorship of media, the FCC has continued to recognize the constitutional limitation against an absolute ban. In 1987, it observed that an "absolute ban on broadcast speech would run afoul of this constitutional premise." *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 931, *reversed in part on other grounds*, *Action for Children's Television v. FCC*, 852 U.S. 1332 (D.C. Cir. 1988).

The D.C. Circuit held, in *Action for Children's Television*, 852 F.2d at 1344, that "[b]roadcast material that is indecent but not obscene is protected by the first amendment." The court found that the sole basis for channeling is to protect unsupervised children. 852 F.2d at 1340. "Government's role is only to facilitate parental supervision of children's listening." 852 F.2d at 1343. It found that "the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished . . . unless the FCC adopts a reasonable safe harbor rule." 852 F.2d at 1343, n.18.

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obviously, is not the ideal forum for determination of constitutional rights. It is even less so when the decisions are made on an *ad hoc* basis.

Absolute protection of children against any possible occasion of being exposed to speech regarded as unsuitable is not an appropriate goal. The pursuit of such an unreasonable goal would inevitably limit adults to receiving "only what is fit for children" *Butler v. Michigan*, 352 U.S. 380, 383-84 (1957). The society does not pursue such absolutism in the goal of protecting children from dangers vastly more certain and damaging than any experienced from hearing indecent language. Every year large numbers of children are killed or maimed by automobiles. While this damage is reduced by the channeling of automobile use in ways that promote safety, the only way to ensure absolute protection would be to ban cars or abolish highways. Society will not accept such an absolute measure even to protect a substantial number of lives. Absolutism must similarly be avoided in addressing harms which are more speculative and minor in nature, particularly when the harm to be avoided is intertwined with an essential Constitutional liberty, the right of free speech.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

WILLIAM J. BYRNES
Counsel of Record
JOHN CRIGLER
HALEY, BADER & POTTS
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 331-0606
Counsel for
Pacifica Foundation

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